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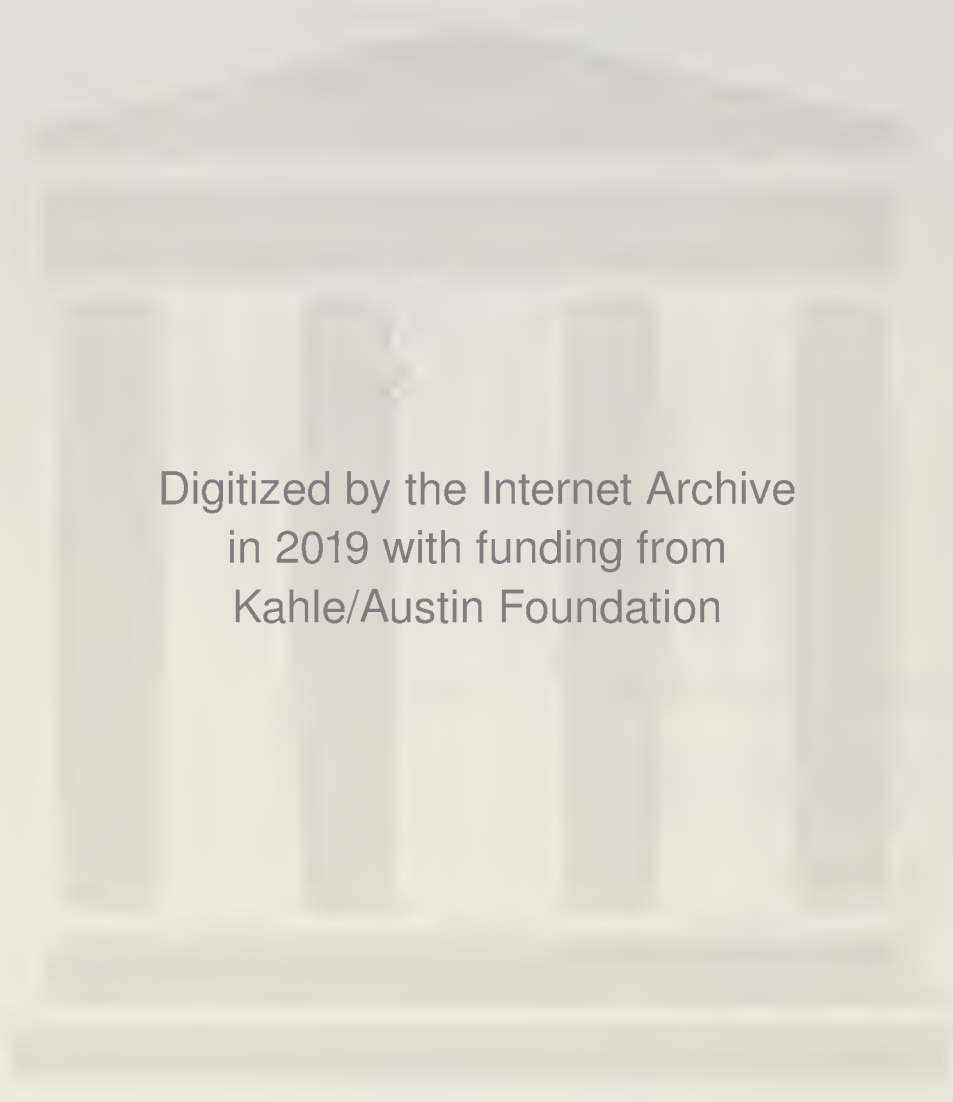
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ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS
CHATHAM HOUSE
10 ST. JAMES'S SQUARE, LONDON, S.W. 1

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THE LEGISLATIVE TECHNIQUES OF THE INTERNATIONAL LABOUR ORGANIZATION*

By J. F. McMAHON¹

A. THE HISTORICAL DEVELOPMENT OF THE LEGISLATIVE TECHNIQUES

THE International Labour Organization, as the Permanent Court of International Justice observed, does not possess, 'any direct legislative power'. Yet it had been vigorously advocated by Italy in 1918 that the Organization should be given mandatory power, to the extent that a resolution adopted by two-thirds of the delegates should be binding on all member States.² Such a radical and progressive proposal was not accepted.³ However, as a stimulant for the future and a concession to the Italian proposal, the Commission on International Labour Legislation adopted a resolution in February 1919 expressing the hope, 'that as soon as may be possible an agreement may be arrived at between the High Contracting Parties, with a view to endowing the International Labour Conference with power to take, under conditions to be determined, resolutions possessing the force of international law'.⁴ This hope has yet to materialize and it may

*© J. F. McMahon, 1967.

¹ M.A., LL.B., (Cambridge), LL.M. (Harvard), of the Inner Temple Barrister at Law, Fellow and Lecturer in Law Hertford College, Oxford. The author wishes to acknowledge that he is indebted to the Rockefeller Foundation for a grant which enabled him to spend some time in Geneva in order to obtain material for this article. He would also like to acknowledge that he is indebted to Dr. C. W. Jenks Deputy Director General of the International Labour Organization, and Miss F. Morgenstern of the International Labour Office, for a number of valuable comments and suggestions.

² J. T. Shotwell, *The Origins of the International Labour Organization*, 2 vols.: vol 1, *History* and vol. 2, *Documents*. See vol. 1, p. 146: 'In the first phase, the proposal before the Commission was attacked on the ground that it was not sufficiently radical, and various attempts were made to secure the acceptance of a system which would give the Conference mandatory, or something approaching mandatory, power'; p. 120: 'Several meetings took place between Mr. Barnes and Signor Cabrini of the Italian Delegation from which it appeared that the Italian attitude was very advanced and in favour of setting up a body with mandatory powers'; and p. 147: the Italian Delegation put forward the resolution 'The Commission is of opinion that the Conventions adopted by two-thirds of the Delegates should have statutory effect, as regards the states adhering, after the lapse of one year'. Later the Italian Delegation put forward a modified proposal: 'The Commission resolved that all states participating in the Conference shall be obliged to carry out within one year Conventions approved by a two-thirds majority of the Conference . . .'

³ *Ibid.*, p. 148.

⁴ *Ibid.*, pp. 112-13. 'As has been mentioned above, one of the most difficult problems to be faced was the nature of the powers which the international organization could exercise: in other words, whether its functions should be mandatory or merely advisory. It is difficult in 1934 to imagine a scheme which would give to an international conference real legislative

be argued from hindsight that, although opinion was reasonably favourable and receptive in 1918 to that far-reaching proposal, its implementation might well have proved premature in practice and the progress illusory.

Instead, the Organization chose to proceed in a pragmatic manner, pursuing a policy of a gradual accretion of its powers and a commensurate attrition of State sovereignty, by developing and refining certain legislative techniques and processes. In this way, whilst a measure of power was entrusted to the Organization, the realization of the dependence of the Organization on member States for the effective implementation of labour standards was recognized.¹

This relationship between the Organization and its members was reflected in Article 19 of the 1918 Constitution which stated that:

‘When the Conference has decided on the adoption of proposals with regard to an item in the agenda, it will rest with the Conference to determine whether these proposals should take the form: (a) of a recommendation to be submitted to the Members for consideration with a view to effect being given to it by national legislation or otherwise, or (b) of a draft international convention for ratification by the Members.

‘2. In either case a majority of two-thirds of the votes cast by the Delegates present shall be necessary on the final vote for the adoption of the recommendation or draft convention, as the case may be, by the Conference.

‘3. In framing any recommendation or draft convention of general application, the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different, and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

‘4. A copy of the recommendation or draft convention shall be authenticated by the signature of the President of the Conference and of the Director, and shall be deposited with the Secretary-General of the League of Nations. The Secretary-General will communicate a certified copy of the recommendation or draft convention to each of the Members.

‘5. Each of the Members undertakes that it will within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year then at the earliest practicable moment and in no case later than 18 months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

‘6. In the case of a recommendation the Members will inform the Secretary-General of the action taken.

‘7. In the case of a draft convention, the Member will, if it obtains the consent of powers as other than fantastic and impractical. But in 1918 revolutionary ideas seemed less startling, and not wholly incapable of realization. The Allies had become accustomed to all sorts of international ‘controls’ of raw materials, shipping, etc., during the war, and the further step to powers of international legislation in a defined technical field, far from seeming impossible, seemed an almost natural evolution. In the sphere of international labour problems, where the element of commercial competition was of great importance, the idea of an organization with mandatory powers seemed in fact the simplest and fairest solution . . .’.

¹ Ibid.

the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

'8. If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.

'9. In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.

'10. The above Article shall be interpreted in accordance with the following principle:—

'11. In no case shall any Member be asked or required, as a result of the adoption of any recommendation or draft convention by the Conference, to lessen the protection afforded by its existing legislation to the workers concerned.'¹

The Article represented a compromise therefore between endowing the Labour Conference with powers of merely an advisory character and giving it supra-national authority. The obligation incumbent on governments to lay before their national parliaments for consideration such instruments as were adopted by a two-thirds majority still left the parliaments free to determine to reject or implement the conventions or recommendations. However, it was expected that pressure of public opinion, together with the pressure exerted by the labour movement within the various countries, would constitute two cogent factors in favour of implementation and compliance.²

The genesis of Article 19 is both intricate and complex. Prior to the Peace Conference and the establishment of the International Labour Organization, international attempts to regulate labour had been meagre.³ The Berlin Conference of 1890, although it had proved of value in focusing public opinion on labour problems, had ended in failure.⁴ However, continuous and vigorous efforts by the International Association for Labour Legislation⁵ were more successful in giving rise to the Berne Conventions in 1906, the only two general treaties⁶ purporting to regulate labour conditions before the war, one restricting the night work of women in industry and the other prohibiting the use of white phosphorus in matches.⁷ A technical conference in 1905 preceded the adoption of these conventions and a second technical conference was held in 1913 to prepare for the drafting of two more conventions.⁸ However, the intended diplomatic conference could not be held owing to the outbreak of war. During the

¹ Ibid., pp. 162 and 434.

² Ibid., pp. 116-17.

³ Ibid., pp. 1-83 generally.

⁴ Ibid., pp. 21-24.

⁵ Ibid., pp. 29-36.

⁶ Concerning bilateral agreements, see *ibid.*, p. 52.

⁷ Ibid., pp. 9 and 42-47.

⁸ Ibid., p. 47.

war, conditions facilitating¹ the international regulation of labour problems developed and the impetus towards it gathered momentum, as is manifest in the important resolutions adopted by the Leeds Conference of Trade Union representatives of the Allied countries in 1916,² the Berne International Trade Union Congress in 1917³ and the Inter-Allied Labour and Socialist Conference in 1918.⁴ Although the steps taken towards international labour legislation prior to 1918 were very modest, they were to provide a valuable depository of experience on which the Peace Conference was to draw freely.⁵

In the preparatory work for the Peace Conference itself, it was Article 19 which proved the most troublesome and difficult on which to reach agreement.⁶ The basis of the disagreement was not so much whether or not the Organization was to possess mandatory powers, although both Italy⁷ and France⁸ felt strongly on this question, but on an issue which has continued to bedevil the Organization throughout the whole of its existence, namely, the constitutional difficulties of a federal State concerning implementation of international labour conventions. In the United States, for example, labour matters are almost exclusively within the competence of the individual states and not the Federal Government.⁹ This incapacity of the central Government led to vigorous agitation by the American delegation for the restriction of the element of formal legal obligation incumbent on governments to a minimum. The direct result was a provision empowering the International Labour Conference to adopt recommendations as well as conventions:

'There are some States, such as the United States of America, that embrace many competent authorities in the sense in which the words are used in our document; and each of these competent authorities has a right, and must be left to decide for itself. It was because of this that we had to give the right to the Conference—to impose an obligation upon the Conference rather—to cast their findings in certain cases in the form of a Recommendation instead of a Convention, and we also had to provide, even if it were cast in the form of a Convention, that it would still be open for a federal State to adopt it as a Recommendation to put before its own competent authorities and give effect to it, if at all, in its own time and in its own way—the net result of this is, that a less degree of obligation falls upon a federal State than upon other States signatory to our document. That is bad: it is regrettable, but as we found, unavoidable.'¹⁰

¹ Shotwell, *op. cit.*, vol. 1, pp. 51–54 and 55–78.

² *Ibid.*, pp. 60–64.

³ *Ibid.*, p. 67.

⁴ *Ibid.*, p. 69.

⁵ *Ibid.*, pp. 51–52. 'The pioneer period ended with the outbreak of the war in 1914, but the experience which had been gained during this period contributed largely to the development which was to follow the restoration of peace. Of the four or five leading ideas embodied in the scheme of an International Labour Organization adopted by the Peace Conference in 1919, three, namely (1) the holding of periodical conferences for the conclusion of international agreements; (2) the creation of a central organ, and (3) supervision over, and enforcement of, the observance of conventions, came from this pre-war experience.'

⁶ *Ibid.*, p. 393.

⁷ *Ibid.*, vol. 2, p. 287.

⁸ *Ibid.*, p. 288.

⁹ *Ibid.*, vol. 1, p. 152.

¹⁰ *Ibid.*, vol. 2, p. 393.

As is indicated in the above text, the constitutional difficulty in the case of federal States concerns not the authority to ratify but the legislative action required to implement international labour standards. American concern on this point is amply supported by reference to her meagre record concerning the ratification and implementation of conventions. Out of 121 conventions adopted by the International Labour Conference, America has ratified six. The position in regard to other federal States varies considerably from one State to another and has varied in different federal States at various stages of development. For example, both India and Switzerland have a far wider federal competence than the traditional federal competence of the United States, Canada and Australia and even in these three countries the scope of federal action in respect of matters dealt with in International Labour Conventions continues to widen. In both Australia and Canada substantial progress has been made in recent years in negotiating a measure of agreement between the Federal and the state or provincial Authorities, which has permitted of important ratifications. At the moment the ratification figures for federal States other than the United States are: Australia twenty-six ratifications, Canada twenty-three, India and Switzerland thirty each.¹ One may note that although the ratification figures of Australia and Canada are well below those of unitary States at a comparable stage of development, the same does not appear to be true of India and Switzerland; India's ratification record compares favourably with that of other Asian countries, while Switzerland's is not substantially below that of some comparable European countries, such as Austria.

In the British draft proposals, which constituted the basis of the discussions of the Commission appointed by the Peace Conference,² no reference had been made in Article 18³ to the possibility of formulating recommendations.⁴ Reference was merely made to the adoption of conventions which would be binding on States after one year unless they were explicitly rejected by the national legislature.⁵ This text gave rise to an extensive and acute controversy⁶ during which the American delegate put forward a modified text.⁷ Various suggestions were then advanced,

¹ See *Report of the Committee of Experts on the Ratification and Application of Conventions and Recommendations* (1967).

² Shotwell, *op. cit.*, vol. 1, p. 127.

³ Article 18 in the draft proposals was later to become Article 19 of the Constitution of the International Labour Organization.

⁴ Shotwell, *op. cit.*, vol. 1, p. 145, Article 18: 'when the Conference has approved any proposals as to an item in the Agenda, these proposals shall be embodied in the form of an international Convention. This Convention shall then forthwith be laid for final consideration and decision before the Conference'

⁵ *Ibid.*

⁶ *Ibid.*, p. 146.

⁷ *Ibid.*, p. 149. The American delegation proposed to add after the words, 'unless such Convention is disapproved by its legislature . . . '—the words—'and except where this undertaking is inconsistent with the constitution or organic law of any of the High Contracting Parties,

notably that the States concerned should undertake the necessary steps to acquire the power of assuming international obligations concerning labour matters before the first meeting of the International Labour Conference,¹ that the component states of a federation should be allowed to adhere separately to a Convention,² or that 'substantial compliance' should be acceptable.³ It was the second proposal, allowing the component states to adhere separately, that was subsequently adopted, although two Governments voted against it and four abstained.⁴

However, such a solution was not regarded as satisfactory⁵ and informal discussions continued in an attempt to find a formula which would not only resolve the legal division of power and political jealousy with which the Federal Government and constituent states regarded each other, but would also correlate as far as possible the obligations to be assumed by federal and non-federal States within the Organization.⁶ It was at this point that a new text was put forward for consideration by the American delegation and the concept of a 'recommendation' introduced for the first time. Such a concept in itself was unobjectionable, but the American proposal also involved a severe emasculation of the British text concerning the legal obligations imposed by the adoption of a draft convention.⁷

and in such case, it shall be obligatory on such High Contracting Party to use its utmost efforts to bring about such legislation as shall give full effect to any Convention as approved.'

¹ Shotwell, *op. cit.* vol. 1, p. 150.

² *Ibid.*, p. 151.

³ *Ibid.*, p. 152.

⁴ *Ibid.*, pp. 153-4.

⁵ *Ibid.*, pp. 153-8.

⁶ *Ibid.*, p. 156.

⁷ *Ibid.*, pp. 158-9. The American proposal was as follows: '...when the Conference has decided on the adoption of proposals with reference to an item on legislation for labour in the Agenda, these proposals shall be embodied in the form of a recommendation for suitable legislation, or other suitable action.

'Such recommendation shall forthwith be laid before the Conference for consideration and decision. If on the final vote the recommendation receives the support of two-thirds of the votes cast by the delegates present, it shall be held to be adopted by the Conference, and a copy of the recommendation, authenticated by the signatures of the President of the Conference and of the Director, shall be deposited with the Secretary-General of the League of Nations. The Secretary-General shall then communicate a certified copy of the recommendation to each Power represented at the Conference for appropriate legislation or other action necessary to make effective the provisions of such recommendation. Thereupon each of the High Contracting Parties will, within the period of one year at most from the end of the meeting of the Conference, bring the recommendation before the national authority or authorities within whose competence the matter lies, for the enactment of such legislation or other action. If, in the case of any High Contracting Party, no legislation or other action necessary to make such recommendation effective is taken, the submission of the recommendation for such action shall end the obligation of such High Contracting Party.' The American delegate then explained that this new proposal called for the insertion of two further Articles, 20 and 21, as follows: 'The Conference may at any time by two-thirds vote of its members cause any proposal it has adopted and recommended to be embodied in a Draft Convention. The Conference, after consideration of any such draft Convention, may by a two-thirds vote of the members of the Conference approve the same, and any draft Convention so approved by the Conference shall be authenticated, deposited and communicated by the Secretary-General of the League of Nations as provided in Article 19 to the High Contracting Parties as a draft Convention approved by the General Conference. If any one or more of the High Contracting Parties shall sign and ratify a Convention which has been communicated as a draft Convention approved by the Conference, the same shall be deposited with the Secretary-General of the League of Nations, and any subsequent adherence thereto of any one or more of

On this ground the new text was criticized by the French, Italian and British delegates and the British delegate summarized the divergent views:

'The British proposal was that a convention must be submitted to the competent authority, but that there was no obligation to carry it out unless approved by them. The American proposal was (a) that recommendations might be made with the same obligation as to submission, but that each State would give effect to them in its own way, and (b) that conventions might be prepared but that there should be no obligation to submit them to their competent authorities or to enforce them if adopted.'¹

A subcommittee was appointed and, after sharp disagreement, a compromise was finally agreed between the British and American views. The first modification of the original scheme involved giving the Conference power to adopt recommendations. The second modification was to provide that in the case of a federal State, its government might elect to treat any 'draft convention' as a 'recommendation'. The invidious result was that the element of obligation assumed by federal States under the Constitution of the Organization was less than that assumed by all other States. However, the second modification was to be strictly limited to federal States and therefore the important British proposal, that States were under an obligation to refer a draft convention which had been adopted by the Conference, for consideration to the appropriate municipal authorities, was retained.

A second controversial issue, already adverted to, concerned the nature of the powers to be exercised by the Conference under Article 19: whether they should be merely consultative or mandatory. The Italian delegation suggested a resolution providing that 'the Commission is of opinion that the Conventions adopted by two-thirds of the Delegates should have statutory effect, as regards the States adhering, after the lapse of one year . . .';² later, the Italian delegation modified this resolution, proposing 'the Commission resolves that all States participating in the Conference shall be obliged to carry out within one year Conventions approved by a two-thirds majority of the Conference . . .'.³ Opposition was expressed by American, British, Japanese, Cuban and Polish delegations and the Italian proposal was withdrawn. Instead, the Commission contented itself by adopting a French resolution, already quoted,⁴ expressing the pious hope that at some point in the future the Conference might be entrusted with mandatory powers; even this proposal was opposed by Britain, America and Japan.⁵ It may be noted that in the final vote on the adoption of Article 19, Italy abstained on the ground that the powers of the Conference

the other High Contracting Parties shall likewise be so deposited. Each High Contracting Party in due course will report to the Secretary-General of the League of Nations any action taken upon a recommendation of the General Conference communicated to it.'

¹ Ibid., p. 160.

² Ibid., p. 147.

⁴ Above, p. 1.

³ Ibid.

⁵ Shotwell, *op. cit.*, vol. 1, p. 148.

had been attenuated too severely.¹ Apart from Italy, Germany also was strongly in favour of giving the Conference some measure of mandatory power: 'The Conference shall take place as need arises, at least, however, once in five years. Each country has one vote; resolutions are only binding if carried by a majority of four-fifths of the voting countries.'² But to this the Allied Powers replied,

'International labour laws cannot at present be made operative merely by resolutions passed at conferences. The workers of one country are not prepared to be bound in all matters by laws imposed on them by representatives of other countries; international conventions, as provided for under the Peace Treaty, are therefore at present more effective than international labour laws, for the infringement of which no penal sanctions can be applied.'³

Compared with the acute controversy concerning the nature of the powers to be ascribed to the Organization and the special provisions for federal States, the other clauses of Article 19 were adopted with little difficulty. The last paragraph of that Article, stating that in no case should the adoption of a convention or recommendation result in a depreciation of the protection afforded by existing municipal legislation, owed its presence to the concern felt by Mr. Gompers for the protection of American seamen and the fear lest future conventions should impair the protection extended by existing American legislation.⁴

The Japanese delegation, in view of the fact that the Japanese Parliament met ordinarily once a year and its session lasted only three months, considered the allowance of one year for placing a draft convention for consideration before the municipal legislature, too little.⁵ Subsequently, an

¹ Shotwell, *op. cit.*, vol. 1, p. 161.

² *Ibid.*, p. 240. In this context the German delegation quoted, p. 244, 'the resolutions of the International Trade Union Congress at Berne', according to which, 'the International Parliament of Labour is to issue not only International Conventions without legally binding force, but also international laws which, from the moment of their adoption, are to have the same effect (legally binding force) as national laws'. See also *ibid.*, vol. 2, p. 301, a declaration of the *Confédération générale du travail*, that, 'in the second place, the C.G.T. considers that the Labour Conference cannot satisfy the hopes of the workers nor fill the role assigned to it except on condition that it possesses, in the most complete manner, the power of legislating on questions which it is called upon to consider, and that its decisions have legal force internationally'.

³ *Ibid.*, pp. 247, 400 and 468. See also p. 373: 'Other delegations, though not unsympathetic to the hope expressed in the first resolution printed at the end of the draft convention, that in course of time the Labour Conference might, through the growth of the spirit of internationality, acquire the powers of a truly legislative international assembly, felt that the time for such a development was not yet ripe. If an attempt were made at this stage to deprive States of a large measure of their sovereignty in regard to labour legislation, the result would be that a considerable number of States would either refuse to accept the present convention altogether, or, if they accepted it, would subsequently denounce it, and might even prefer to resign their membership of the League of Nations rather than jeopardise their national economic position by being obliged to carry out the decisions of the International Labour Conference. The majority of the Commission therefore decided in favour of making ratification of a convention subject to the approval of the national legislatures or other competent authorities.'

⁴ *Ibid.*, p. 163.

⁵ *Ibid.*, p. 149.

amendment was made by the plenary session of the Peace Conference which allowed a period of eighteen months in exceptional circumstances.¹

The provision concerning authentication of a recommendation or draft convention by the Director of the Organization and President of the Conference, although important as a substitute for signature by plenipotentiaries, appears to have been adopted without any controversy, although it was later to give rise to certain difficulties in practice.²

The formula contained in paragraph 3 of Article 19 concerning the cognizance to be taken, when framing a recommendation or draft convention, of countries in which climatic conditions, imperfect development of industrial organization or other special circumstances make the industrial conditions substantially different, was not considered by the Commission but was put forward subsequently at the proceedings of the preliminary Peace Conference.³ India, in particular, attached great importance to such a provision⁴ which was only the first of innumerable subsequent devices attempting to accommodate and regulate within one convention or recommendation unduly disparate economic and social circumstances.⁵

The prescription in paragraph 2 of Article 19 concerning the requirement of a two-thirds majority for the adoption of a convention or recommendation was unobjectionable and the British view that ' . . . nothing less than a two-thirds majority would indicate that there was a sufficient body of opinion to require the Governments of the different countries to pay attention to it . . . ' ⁶ was accepted. More difficulty was experienced in determining the number of votes to be allocated to government delegates, employers' delegates and employees' delegates respectively; there had been some support for delegations to be composed of one government delegate, one employers' delegate and one employees' delegate, each with one vote.⁷ However, practical considerations dictated the need to allow Governments two delegates with one vote each:

'The consideration of the rôle which would have to be played by the national parliaments, and therefore by the governments which controlled a majority in them,

¹ Ibid. p. 149.

² Especially concerning the meaning of the term 'draft Convention'. See Jenks, 'Some characteristics of the I.L.O. Conventions', *Canadian Bar Review* (1935), pp. 448-62.

³ Shotwell, op. cit., vol. 2, p. 395.

⁴ Ibid., pp. 404-5. 'We feared that the special conditions of Eastern countries might not be sufficiently realized. We apprehended danger that the international regulation of labour might, under the pressure of public opinion, tend to make backward countries adopt, contrary to their best interests, and possibly against their will, measures which were not adapted to their conditions. Happily these differences of conditions have now been fully recognized by the slight addition which Mr. Barnes commended to your attention to-day . . . with this safeguard, to which we in India attach the highest importance, we gladly and whole-heartedly accept this Convention . . . '.

⁵ See below, p. 31.

⁶ Shotwell, op. cit., vol. 2, p. 121. Germany was in favour of a four-fifths vote.

⁷ Ibid., vol. 1, pp. 134-6.

raised again, from a somewhat different angle, the question of the status to be accorded to non-governmental representatives in the proposed organization. If governments, with the consent of parliaments, were to have the final responsibility of accepting or rejecting any proposed international regulation, it seemed to follow that they must have a decisive voice in the discussions leading to the international adoption of the regulation in question. On the other hand, representation of workers and employers seemed equally necessary in order to secure that the regulations should be drawn up in the light of full knowledge of industrial conditions, and in order to secure the best possible conditions for their subsequent application. It might be regarded as doubtful whether employers and workers would be content merely to act as advisers when decisions so vitally affecting them were being taken.¹

It is interesting to note that at an earlier stage there had even been a suggestion that the Conference should sit as a tri-cameral body and that the three constituent bodies should only meet together occasionally.²

It will now be apparent that Article 19 of the Constitution was the product of a rather painful process of parturition. Prior to its birth, attempts to regulate labour problems on an international level were extremely meagre. Ambitious endeavours by Italy and France to endow the Conference with mandatory powers were frustrated and even the more modest British project that a convention adopted by the Conference should be binding after one year unless explicitly rejected by the national legislature proved unacceptable.³ Two further concessions were then made in order to accommodate the peculiar constitutional difficulties of federal States. First, the concept of recommendations was introduced.⁴ Secondly, federal States were to be allowed to treat draft conventions as recommendations. However, despite this attenuation of the powers of the Conference and the consequent disparity in the obligations assumed by member States, Article 19 represented a most important innovation and incursion on State sovereignty⁵ in the following respects:

¹ Shotwell, *op. cit.*, vol. 1, p. 113.

² *Ibid.*, vol. 2, pp. 113-14. 'It is interesting to note a suggestion . . . to the effect that there should be three separate representative bodies, one consisting of government representatives, one of employers' representatives, and one of workers' representatives, which would meet separately as a rule but which might hold joint meetings if occasion should demand. Although this scheme was never put forward officially it was in some ways a forecast of the 'group system' which has since grown up within the Organization, although no constitutional provision is made for it.'

³ Instead, it was not to be binding unless it was positively accepted by the Parliament: *ibid.*, vol. 1, pp. 146 et seq.

⁴ *Ibid.*, vol. 2, p. 374. 'The Commission felt that there might in any event be instances in which the form of a recommendation affirming a principle would be more suitable than that of a draft convention, which must necessarily provide for the detailed application of principles in a form which would be generally applicable by every State concerned. Subjects will probably come before the Conference which, owing to their complexity and the wide differences in the circumstances of different countries, will be incapable of being reduced to any universal and uniform mode of application. In such cases a convention might prove impossible, but a recommendation of principles in more or less detail which left the individual States freedom to apply them in the manner best suited to their conditions would undoubtedly have considerable value.'

⁵ *Ibid.*, vol. 1, p. 175. 'The system of the individual vote allowed for the formation of an effective

1. A State, even if it voted against the adoption of a convention or recommendation—assuming the instrument received the requisite number of votes for adoption—would be legally obliged to submit the instrument for consideration to its national legislature within one year or eighteen months.

2. Unlike the unanimity principle embodied in the Covenant of the League,¹ the vote required for the adoption of an instrument was by majority—a two-thirds majority.

3. Fifty per cent. of the votes were controlled by non-governmental representatives, namely, employers and employees.

4. All delegates were to be entitled to vote individually on matters coming before the Conference.²

5. On adoption, these instruments, instead of being submitted for signature by each member State, were merely authenticated by the signature of the President of the Conference and the Director of the Organization.

6. There now existed a permanent secretariat for drafting and preparing international labour conventions and recommendations and a tripartite Conference, convened annually, to participate in the drafting and to adopt such instruments.

7. Under Article 22 of the Constitution,³ each of the members assumed the legal obligation to make an annual report to the International Labour Office on the measures which it had taken to give effect to the provisions of the conventions to which it was a party.

A radical operation on the Constitution of the International Labour Organization was carried out at the end of the war. There were two stages in the revision of the Constitution.⁴ In 1945, at the Paris Conference, decisions were taken on questions which were of immediate urgency,

majority not defined by national frontiers, and in this way the principles of State sovereignty were clearly infringed. By the obligation imposed on the Governments to submit to their legislative authorities the decisions arrived at by this majority, even if they themselves did not agree, the principle of State sovereignty was again infringed. It should not be forgotten in this connection that the veto which could be employed in the last resort was not that of the Governments, but only that of the Parliaments. All these were considerable innovations far in advance of those which the Commission of the League of Nations had thought possible to propose to the Conference of Plenipotentiaries in matters affecting its own work. . . . Within its sphere, on the contrary, the Commission was asked to decide that the Governments should abandon half their sovereignty. Henceforth, they would only have two votes out of four, and they bound themselves nevertheless to put before their Parliaments decisions in which, under the most favourable circumstances possible, they would not have participated except to the extent of 50 per cent. The view thus put forward was indeed so bold that what was to be feared was that it would not be accepted by the Peace Conference.'

¹ Covenant of the League of Nations, Article 5 (1).

² See Article 4 of the I.L.O. Constitution.

³ See Article 22 of the I.L.O. Constitution.

⁴ C. Jenks, 'The Revision of the Constitution of the I.L.O.', this *Year Book*, 23 (1946), pp. 303-17.

mainly those resulting from the demise of the League, such as membership, finance and amendment of the Constitution. At Montreal, the following year, the more far-reaching issues concerning the powers of the Organization, were discussed and revised. The Conference Delegation worked in the period between the two sessions of the Conference. On the subject of the powers of the Organization, the Delegation stated:

'The most far-reaching of the numerous proposals on the subject which have been referred to the delegation for consideration is the proposal which has been put forward from time to time that the International Labour Organization should be given mandatory powers and entitled to take decisions binding upon its members—. . . while certain members of the delegation, and notably Mr. Jouhaux, expressed their profound conviction that the world must ultimately evolve towards the establishment of a supra-national authority having economic as well as political attributions, and that a stable peace cannot be secured on any other basis, it was unanimously agreed that the prospect of establishing a world-wide organization with mandatory powers in respect of social legislation is altogether remote, and that in all probability the only result of any attempt to develop the International Labour Organization along such lines would be to destroy what already exists. There is no evidence that governments, employers or workers are either able or willing to vest in an international body power to bind in respect of such matters the constituencies to which they are responsible. If the Conference had nominal mandatory powers, the complexity of the world-wide problems confronting it would inevitably make it most reluctant to exercise them in practice. Many conventions which have been adopted and have progressively come into force by successive national ratifications would certainly have failed to secure the majority necessary for adoption if the effect of such adoption would have been to make them applicable automatically and immediately, without the further consideration in each country which precedes ratification under the present arrangements. The result would have been to weaken the content of the body of international standards on the basis of which impressive progress has been gradually made in many countries. There is therefore no short cut to the strengthening of the International Labour Organization as a more effective world-wide agency by way of the attribution of mandatory powers to the International Labour Conference. Experience strongly suggests, indeed, that the extent of the legal powers of the Organization is much less important than the extent to which its existing potentialities are vigorously developed by bold and wise leadership, for one of the principal hindrances to the effectiveness of the International Labour Organization in the past has been the limited scale on which it has been possible to develop its work on the basis of its recognized powers and responsibilities.'¹

A number of practical, more modest, suggestions were, on the other hand, advanced for augmenting the power of the Organization. First, it was suggested that members should be obliged to submit unratified conventions and recommendations which had not yet been implemented to the appropriate legislative authorities at frequent intervals of at least once every five years.² However, it was felt that there were a number of practical objections

¹ *Proceedings of the International Labour Conference, 29th Session (Montreal, 1946), Report on Constitutional Questions, p. 36.*

² *Ibid.*, p. 43.

to the proposal and that any advantages that might accrue from its adoption could be better achieved through the system of annual reports.¹

A second proposal, was to the effect that a government might ratify a convention on the basis of legislation which, although it did not coincide in precise and minute detail with the convention concerned, was 'substantially equivalent' to the requirements of the convention from the point of view of the measure of social protection it afforded. Three objections were, however, urged against this proposal.² What, it was asked, was to be the criterion to determine the extent to which municipal legislation substantially embodied and reflected the standards contained in a convention? Again, who would be competent to resolve a dispute on the matter if such a dispute were to arise? And, thirdly, who was to be authorized to ascertain the true facts if it was alleged that substantial compliance did not exist in practice? Finally, it was said that the object, namely, that a government should receive credit internationally for social legislation which approximated to or was superior to, although divergent in detail from, the international standards contained in a convention, could be largely achieved through a system of reports on unratified conventions. In this way, formal note might be taken of a situation where national legislation substantially implemented the obligations of a convention.

As to formal amendments to the Constitution, there were a number of important changes which represented an extension of the legal obligations imposed on member States:³

1. In future, members were to inform the Director of the Organization of the measures taken in accordance with Article 19 to bring conventions and recommendations before the competent authority or authorities, with particulars of the authority or authorities regarded as competent and of the action taken by them.

2. Instead of the provision that if a convention failed to obtain the consent of the competent authority or authorities, 'no further obligation shall rest upon the member' there was substituted the provision that:

'... no further obligation shall rest upon the Member except that it shall report to the Director of the International Labour Office, at appropriate intervals as requested by the Governing Body the position of its law and practice in regard to the matters dealt with in the Convention and showing the extent to which effect has been given or is proposed to be given to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.'

This was the first time that allusion had been made to the possibility that the provisions of a convention might be applied to a certain extent by

¹ Ibid.

² Ibid., p. 50.

³ Ibid., pp. 43-48.

means of collective agreements;¹ thus reflecting the increasingly important part played by collective agreements in the regulation of the industrial life of countries with highly developed industrial organizations.

3. Another striking innovation was the amendment of the clause specifying that, if on a recommendation no legislative or other action was taken to make the recommendation effective, no further obligation was to rest upon the member. For this there was substituted the provision:

‘Apart from bringing the Recommendation before the said competent authority or authorities, no further obligation shall rest upon the Members, except that they will report to the Director of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation and showing the extent to which effect has been given or is proposed to be given to the provisions of the Recommendation and such modifications of these provisions as have been found or may be found necessary to make in adopting or applying them.’²

4. It was also provided that each member should communicate to the representative organizations (as mentioned in Article 3, paragraph 5 of the Constitution) copies of the information and reports communicated to the Director-General in pursuance of Articles 19 and 22.

5. The difficult problem of the degree of obligation incumbent on federal States was subjected to much more detailed and precise definition than under the 1918 Constitution and the obligations imposed on such States were augmented. In the case of conventions and recommendations which a federal government regarded as appropriate under the Constitution for federal action, its obligations were made identical with those of a non-federal State. In the case of conventions and recommendations which a federal government regarded as appropriate under the Constitution, in whole or in part, for action by the component states, the federal government was to:³

‘(a) Make, in accordance with its Constitution and that of the States concerned, effective arrangements for referring such conventions and recommendations, within eighteen months from the end of the Conference, to the appropriate federal, State, provincial or cantonal authorities for the enactment of legislation or other action.

‘(b) Arrangements were also to be made, with the consent of the constituent States, for periodical consultations between the federal and the State, provincial or cantonal authorities in order to promote within the federal State co-ordinated action to give effect to the provisions of such conventions and recommendations.

‘(c) In future, a federal State was also to be under an obligation to inform the Director-General of the International Labour Office of the measures, taken in accordance with Article 19, to bring such conventions and recommendations before the appropriate authority or authorities, with particulars of the authorities regarded as appropriate and of the action taken by them.

¹ *Proceedings of the International Labour Conference*, 29th Session (Montreal, 1946), Report on Constitutional Questions, p. 48.

² *Ibid.*, p. 47.

³ *Ibid.*, pp. 50-65.

'(d) Concerning conventions not ratified by it, a federal State was to report to the Director-General, at appropriate intervals as requested by the Governing Body the position of the law and practice of the federation and its constituent States, provinces or cantons in regard to the convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the convention by legislation, administrative action, collective agreement, or otherwise.

'(e) Finally, in the case of recommendations it was also to be incumbent upon a federal State to report to the Director-General, at appropriate intervals, the position of the law and practice of the federation and its constituent States showing the extent to which effect has been given, or is proposed to be given, to the provisions of the recommendation and such modifications of these provisions as have been found or may be found necessary in adopting or applying them.'¹

A number of other changes,² constituting not so much additional obligations as a clarification of existing obligations, included a rearrangement of the form of Article 19, the erasure of the word 'draft' from 'draft convention', the description of recommendations as being designed, 'to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a convention' and the substitution for paragraph 11 of the 1910 Constitution of a more comprehensive provision in paragraph 8 of Article 19 as follows:

'In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.'

The importance of the constitutional amendments adopted at Montreal in confirming and developing the legislative techniques of the Organization will now be manifest. In brief, they represented an extension and vigorous application of the system of Reports. Member States (including the federal States) were now obliged to disclose the measures taken to bring conventions and recommendations before the appropriate national authorities and in the event of non-ratification of a convention, or non-implementation of a recommendation, the obstacles inhibiting implementation and the current position of their law and practice on the subject. Such information was also to be made available to the most representative industrial organizations within the country. The emphasis on actual practice as distinct from the law, the increase in the obligations of federal States, and the kind and volume of information now to be made available, all constituted important innovations. Although the Conference still possessed no direct legislative power, the recurrent pressure and exposure to which States were subjected had been greatly intensified and States were placed in a position where they had to justify to other member States their refusal to ratify a particular convention or implement a certain recommendation. The Organization

¹ Ibid.

² Ibid., pp. 43-44.

proceeds by a process of attrition, directed at wearing down the resistance of States. As with human beings, this policy is frequently successful.

B. THE LEGISLATIVE TECHNIQUES

I. *Conventions*

The International Labour Conference has adopted some 122 conventions¹ on a broad spectrum of subjects. In the *International Labour Code* these subjects have been classified under twelve headings as follows: Employment and Unemployment;² General Conditions of Employment;³ The Employment of Children and Young Persons;⁴ The Employment of Women;⁵ Industrial Health, Safety and Welfare;⁶ Social Security;⁷ Industrial Relations;⁸ The Administration of Social Legislation;⁹ The International Seafarers' Code;¹⁰ Social Policy in Non-Metropolitan Territories;¹¹ Migration;¹² Statistics and Other Information.¹³ The total number of ratifications of these conventions is more than 3,000, together with more than 1,500 declarations on behalf of non-metropolitan countries.¹⁴ The cumulative result therefore is a substantial international labour code which makes extensive inroads on the domestic domain of a State.

The value of such a network of international obligations is described in the preface of the *International Labour Code*:

'The obligations resulting from ratified conventions have a number of functions the relative importance of which varies from one case to another. In addition to giving a certain stability to the main outlines of social legislation . . . they also fulfil a variety of more immediately tangible and measurable purposes. When ratified and applied they constitute codes of fair international competition; they afford protection for workers employed in countries other than their own; they furnish the necessary legal basis for the international co-ordination of placing arrangements and social services; they resolve conflicts of laws and conflicts of jurisdiction in regard to the application of social legislation; they create rights of an international character, such as the pension rights of migrant workers, which could not be effectively established by action by any one country; they make possible reforms, like the marking of the weight on heavy packages transported by vessels, which it is impossible to make effective without concerted action by a number of countries . . .'¹⁵

The purpose of an international labour convention therefore is to give rise to defined legal obligations on an international and municipal level. This

¹ *Proceedings of the International Labour Conference*, 50th Session (1966).

² *International Labour Code* (1951), vol. 1, pp. 32-143.

³ *Ibid.*, pp. 145-293.

⁵ *Ibid.*, pp. 355-76.

⁸ *Ibid.*, pp. 675-715.

¹¹ *Ibid.*, pp. 927-1100.

⁶ *Ibid.*, pp. 377-494.

⁹ *Ibid.*, pp. 717-54.

¹² *Ibid.*, pp. 1101-63.

⁴ *Ibid.*, pp. 295-354.

⁷ *Ibid.*, pp. 495-674.

¹⁰ *Ibid.*, pp. 755-925.

¹³ *Ibid.*, pp. 1165-81.

¹⁴ *Report of the Committee of Experts concerning the Ratification and Application of Conventions and Recommendations* (1966).

¹⁵ *International Labour Code* (1951), vol. 1, p. lxxi.

function determines what would constitute a suitable subject for embodiment in a convention. Usually the subject-matter will comprise either a number of fundamental guiding principles¹ or a number of detailed technical regulations.²

If a convention is not ratified by a particular State, it serves a different function. It then becomes analogous to a recommendation and serves as a stimulant to a State to pursue and aspire to a certain standard. In fact, conventions produce a substantial part of their practical effect as standard-defining rather than as obligation-creating instruments.³ An important tendency⁴ prompted by the widely disparate social and economic circumstances of the newly independent States, which makes difficult a detailed and precise legal regulation within the framework of one convention, is for a convention to be adopted together with a recommendation, the former formulating the underlying general principles and the latter embodying the more detailed regulations. Both the 1919 Constitution and the Constitution in its amended form in 1946 emphasized that international labour standards are minimum standards, and in no case is the adoption of a convention or recommendation to be deemed to affect any law or custom which ensures more favourable conditions to the workers concerned than those provided for in the convention or recommendation.⁵ Turning next to obligations imposed by Article 19 of the Constitution, these may be summarized as follows:⁶ (a) a convention once adopted by the Conference must be communicated to all members for ratification; (b) each member within a year, or eighteen months at the most, undertakes to bring the convention before the authority within whose competence the matter lies for the enactment of legislation; (c) each member undertakes to inform the Director-General of the measures taken to bring the convention before the competent authority; (d) if a member obtains the consent of the authority concerned it is to communicate the formal ratification of the convention to the Director-General and take such action as may be necessary to make effective the provisions of the convention; (e) if a member does not obtain the consent of the competent authority it is to report to the Director-General, at appropriate intervals, the position of its law and practice concerning the matters dealt with in the convention, showing the extent to

¹ Convention Concerning the Application of the Weekly Rest in Industrial Undertakings, 1921.

² Convention Concerning Accommodation on Board Fishing Vessels, 1966.

³ *International Labour Code* (1951), vol. 1, p. lxviii.

⁴ This is dealt with in more detail later in the section on flexibility clauses.

⁵ See Article 19(8) of the Constitution. A similar clause is often contracted in a convention; see Article 18 of the Convention Concerning Accommodation on Board Fishing Vessels, 1966: 'Nothing in this Constitution shall affect any law, award, custom or agreement between fishing vessel owners and fishermen which ensures more favourable conditions than those provided for by this Convention.'

⁶ See Article 19 of the Constitution of the International Labour Organization.

which effect has been given, or is proposed to be given, to any of the provisions of the convention by legislation, administrative action, collective agreement, or otherwise and stating the difficulties which prevent or delay the ratification of such convention.

As Article 19 gave rise to some confusion and ambiguity, the Labour Office in 1959 circulated a Memorandum commenting on a number of points. The Memorandum first defined the term 'competent authority': 'The expression "competent authority" means the body empowered to legislate in respect of the questions to which the Convention or Recommendation relates, i.e. as a rule, the Parliament.'¹ Next, it underlined that conventions and recommendations must be submitted to the competent authorities in all cases and not only when the ratification of a convention appeared possible or when it was deemed advisable to give effect to the provisions of a recommendation; and at the same time it drew a clear distinction between 'submission' and 'ratification'. Thirdly, the Memorandum explained that the submission to the competent authority should always be accompanied or followed by a statement or proposals setting out the government's views as to the action to be taken on the instruments. It would not be sufficient merely to append the text of the decisions of the Conference without making any proposal.² Fourthly, it pointed out that the time-limit of one year was equally applicable to federal States except where a federal government considered action concerning conventions and recommendations to be appropriate by the constituent states; and that it would be advisable if members indicated in their communication to the Director-General the date on which the decisions of the Conference were submitted to the competent authority. As regards federal States, the Memorandum stated that under Article 19 (7, b, 1), whenever action by the constituent states was considered appropriate, the government must make effective arrangements for the reference of conventions and recom-

¹ International Labour Office, *Memorandum concerning the Obligation to Submit Conventions and Recommendations to the Competent Authorities* (1959), Appl. 195 (Rev. 1): 'The expression "competent authority" means the body empowered to legislate in respect of the questions to which the Convention or Recommendation relates, i.e., as a rule, the Parliament. The Committee is aware that in certain cases the power to legislate may be conferred on the governmental power to ratify, either because the national Constitution does not provide for the separation of powers, or in virtue of constitutional provisions which empower the executive to legislate in certain matters, or as a result of a general or special delegation of powers granted by Parliament to the Government. The Committee therefore considers it necessary for the Government of a State member to indicate on each occasion, with regard to each Convention or Recommendation, what authority is regarded as competent.'

² Ibid. The Memorandum continues: 'The essential points to bear in mind are: (a) that at the time of, or subsequent to the submission of Conventions and Recommendations to the legislative authorities, Governments should either indicate what measures might be taken to give effect to those instruments or propose that no action should be taken or that a decision should be postponed; and (b) that there should be an opportunity to take up the matter for debate within the legislature.'

mendations to the appropriate authorities of the constituent States, for the enactment of legislation or other action. Finally the Memorandum noted that under Article 23 (2) of the Constitution, the information communicated to the Director-General for submission to the competent authorities must be sent also to the representative employers' and workers' organizations.¹

The obligations arising under Article 19 thus are:

1. Within one year, or in exceptional circumstances eighteen months, the convention must be submitted to the competent authority.
2. The competent body is the relevant legislative body and submission must be accompanied or followed by a statement or proposals setting out the government's views on the action to be taken.
3. The Director-General is to be informed of the measures taken and the relevant authority and the date of submission to the relevant authority. This information must also be sent to the representative employers' and workers' organizations.
4. If the relevant authority consents, then the member must communicate the formal ratification to the Director-General and take such action as may be necessary to make effective the provisions of the convention.
5. If the relevant authority does not consent, then a member must report to the Director-General at appropriate intervals, when requested by the Governing Body, the law and practice concerning the matter dealt with in the convention.

Particular emphasis should be given to the fact that the competent authority has been interpreted as the relevant legislative body and not the body competent to ratify. This interpretation is supported by an analysis of the text, the *ratio legis* of the Article, the preparatory work and the subsequent practice of the Organization.² Even in cases where the executive authority has power to implement conventions, it has been suggested that it would be more in accordance with the spirit of the Constitution to afford an opportunity for the consideration of the conventions to the legislative authorities of a member, where such authorities exist.³ It may be submitted that only if one interprets competent authority as referring to the authority to implement rather than to ratify a convention, can one understand the great importance of the Constitution of 1919 in establishing new legislative techniques:

'It is a matter of public notoriety that the Constitution of the International Labour Organization represents a compromise between the traditional procedure for the preparation and bringing into force of international Conventions and the establishment of a genuine international legislature to deal with labour questions . . . the only completely satisfactory way of removing the fetter upon international action represented by the requirement of ratification would have been to invest direct legislative authority in some international body. It is a matter of common knowledge that a strong body of

¹ Ibid.

² Memorandum on the Nature of the Competent Authority Contemplated by Article 19 of the I.L.O. Constitution; *I.L.O. Official Bulletin*, 26 (1944-5), pp. 206-21.

³ Ibid., p. 221.

opinion favoured this course in 1919 . . . Article 19 of the Constitution of the Organization was not intended to go this far, but it most certainly was intended to be an important step in this direction and to represent a considerable advance in international legislative technique as compared with the pre-war position. If, as textual analysis has suggested to be the case, the term 'competent authority' refers to a legislative authority, the Constitution of the Organization does represent such an advance. Though the Conference is not invested by the Constitution with any direct legislative power, the Constitution does require Conventions to be submitted to the legislative authority of each Member and to be ratified if they are approved by that authority.'¹

The legal aspects of the adoption of a convention have already been referred to,² such as the fact that they are drafted and adopted by a tripartite Conference, by a two-thirds majority of the votes cast by the delegates present and that two copies are then authenticated by the signatures of the President of the Conference and the Director-General.³ Under Article 20,⁴ a convention which has been ratified must be communicated by the Director-General to the Secretary-General of the United Nations for registration, in accordance with the provisions of Article 102 of the Charter. As to entry into force, in the majority of conventions two ratifications are sufficient. Conventions adopted from 1919-26 entered into force on the date of the second ratification. It may be noted that, until 1926 provision for immediate coming into force was paralleled by attempts to fix a date by which the terms of the convention had to be effectively implemented; usually this would be about three years after their adoption. Conventions adopted in 1927 entered into force 90 days from the date of registration of the second ratification. Conventions adopted since 1928 usually provide that they will enter into force twelve months after the date of registration of the second ratification. Sometimes, however, a larger number of ratifications is provided for and in certain maritime conventions ratification by a given number of members from a specified list is sometimes required.⁵ The Final Articles usually provide also, that in addition to his obligation to communicate ratifications to the United Nations,⁶ the Director-General must himself notify all members of the Organization of

¹ Memorandum on the Nature of the Competent Authority Contemplated by Article 19 of the I.L.O. Constitution; *I.L.O. Official Bulletin*, 26 (1944-5), pp. 204-11.

² Above, pp. 9-11.

³ Article 19 (4) of the Constitution.

⁴ Article 20 of the Constitution. A similar article is also often included in conventions. See Article 23 of the Convention Concerning Accommodation on Board Fishing Vessels, 1966: 'The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.'

⁵ *International Labour Code* (1951), vol 1, pp. xcvi-xcix. For an example of a prescribed number, see Convention concerning Vacation Holidays with Pay for Seafarers (Revised), 1949, Article 13.

⁶ See Article 19 of the Convention concerning Accommodation of Ships' Crews: 'The formal ratifications of this convention shall be communicated to the Director-General of the International Labour Office for registration.'

the registration of any ratifications¹ and denunciations communicated to him by members.²

Five other important legal aspects of conventions will be dealt with in detail later, namely: flexibility clauses, revision, durability, reservations and interpretation.

II. *Recommendations*

Although recommendations were introduced into the 1918 Constitution in an attempt to assuage the fears of federal States with regard to conventions,³ they were soon employed to serve an extensive variety of purposes. As the Commission itself stated in 1918:

‘There might in any event be instances in which the form of a recommendation affirming a principle would be more suitable than that of a draft convention, which must necessarily provide for the detailed application of principles in a form which would be generally applicable by every State concerned. Subjects will probably come before the Conference which, owing to their complexity and the wide differences in the circumstances of different countries, will be incapable of being reduced to any universal and uniform mode of application. In such cases a convention might prove impossible, but a recommendation of principles in more or less detail which left the individual States freedom to apply them in the manner best suited to their conditions would undoubtedly have considerable value.’⁴

Recommendations may be distinguished from conventions therefore on two grounds: the kind and extent of the legal obligations to which they give rise and the nature of the subject-matter with which they deal. The second distinction was explicitly recognized in the amendment of the Constitution at Montreal in 1946 when words were incorporated in Article 19 providing that proposals before the Conference could take the form of a recommendation ‘to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a convention’.⁵

The legal obligations to which the adoption of a recommendation by the Conference gives rise, is formulated in detail in paragraph 6 of the same Article.⁶ First, the recommendation is to be communicated to all members for their consideration with a view to effect being given to it by national legislation or otherwise. Secondly, each member undertakes that it will, within one year or not later than eighteen months after the closing of the Conference, bring the recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action. Thirdly, members are to inform the Director-General of the

¹ Ibid., Article 23.

² Ibid., Article 22.

³ Above, p. 4.

⁴ I.L.O. *Official Bulletin*, 1 (1919), p. 264.

⁵ I.L.O. Constitution, Article 19, paragraph 1.

⁶ Ibid., Article 19, paragraph 6.

International Labour Office of the measures taken in accordance with Article 19 to bring recommendations before the competent national authority and of the action taken by them. Fourthly, members are to report to the Director-General of the International Labour Office at appropriate intervals, as requested by the Governing Body, the position of the law and practice in their country concerning the matters dealt with in the recommendation, indicating the extent to which effect has been given or is proposed to be given, to the provisions of the recommendation.

So far as concerns submission to the national competent authority, information regarding who is to be considered as competent, the action taken and the obligation to report on the position of the law and practice in the country on the subject-matter in question, the legal obligations created by recommendations and conventions are similar. The essential distinction is that conventions may be ratified and so constitute an international treaty which must be registered with the United Nations and which gives rise to obligations on the international level to implement the provisions of the convention into municipal law. Recommendations, on the other hand, cannot be ratified nor give rise to a legal obligation to implement them.

So far about 120 recommendations have been adopted by the International Labour Conference. The object and purpose they have fulfilled has varied:

‘In some cases the principal objective of a recommendation is the creation of a measure of international uniformity as regards matters in respect of which such uniformity is desirable; the promotion of such uniformity by a recommendation may facilitate the acceptance at a later date of international obligations where such are desirable, and in other cases may make the acceptance of such obligations for the purposes of ensuring uniformity unnecessary, and thus secure some of the advantages of the existence of a network of obligations, while preserving greater freedom of national action. In some cases a recommendation is primarily a contribution to the creation of a common social consciousness extending beyond frontiers. . . . Frequently the main function of a recommendation is to contribute to the wise handling of social and labour problems as national problems by the formulation in an authoritative manner of standards or principles which embody conclusions drawn from the experience of a large number of countries, supplemented by research into new problems and a careful evaluation of new aspirations and the practicability of giving effect to them; the authority of these standards derives from their having been approved by an international conference which is representative of the interests concerned, has adequate technical information and expert knowledge at its disposal, and is world-wide in its range of contacts.’¹

Embodying standards to be aimed at, rather than legal obligations to be implemented, the principles governing their formulation are distinct from those applying to conventions. They attempt to strike a balance between the ideal and the existing practice, so endeavouring to effect an improve-

¹ *International Labour Code* (1951), vol 1, p. lxxi.

ment in international labour standards.¹ By way of example mention may be made of the emergence of the 'model code' type of recommendation in the Safety Provisions (Building) Recommendation, 1937, which embodies a Model Code consisting of technical safety regulations drafted with the precision appropriate to a body of legal requirements.² More extensive use might profitably be made of this kind of recommendation.³ Another example is the system adopted at the Philadelphia Session of the Conference of framing certain recommendations in the form of guiding principles accompanied by suggestions for application. A possible variant of this formula would be a type of bed-rock standard, together with suggestions of a series of stages by which that standard might be improved.

Although, at some points in the history of the Organization, the recommendation has been considered more as the poor relation of the convention,⁴ with the advent of so many new States, the recommendation has received increasingly marked attention and application. It is often urged by the new States that the old conventions do not take cognizance of the peculiar and widely disparate economic and social circumstances of the new States,⁵ whilst the new conventions are often insufficiently flexible to accommodate

¹ *Proceedings of the International Labour Conference*, 29th Session (Montreal, 1946), Report on Constitutional Questions, pp. 35-65, and the *International Labour Code* (1951), vol. 1, p. lxxi: 'In order that Recommendations may be of real weight in the development of social policy, they must strike an appropriate balance between the ideal and the immediately practicable and between precision and flexibility. . . . The standards laid down by Recommendations should therefore represent a compromise between the ideal and the average existing practice . . . since a Recommendation is not intended to create obligations having the same binding character as the provisions of Conventions, it could reasonably aim at a higher standard than it would be appropriate to provide for in a Convention. . . . Recommendations, in contrast to Conventions, represent programmes rather than obligations. . . . A Recommendation will be of little value as a guide to national legislators and administrators if it is no more than a statement of an objective and leaves them to confront unaided the problems of detail as regards which they will require guidance as soon as they attempt to implement the Recommendation. . . .'

² *Ibid.*, p. lxxiv.

³ *Ibid.*: 'The same device is being used in the preparation of model safety codes for other industries and future experience may show it to have a wider field of utility, the emergence of the model code Recommendation suggests the possibility of developing a variety of similar types. In certain cases a model law type of Recommendation may come to be accepted as the most appropriate form for international action, such a model law would doubtless frequently need adaptation before it could be incorporated into any national system of law, but it might be both more effective as a stimulus to uniformity and more useful as a guide to national legislators than any other form of international standard. . . . The I.L.O. might well make use of it in appropriate cases. In like manner, the main features of certain types of collective agreement might be standardised internationally without legislative interference with their terms, national or international, by means of a model collective agreement type of Recommendation. In other cases it might be useful for the conference to adopt Recommendations embodying model, bilateral or plurilateral Conventions, or containing model contracts, model clauses for inclusion in contracts, or sets of model rules for incorporation in contracts, such as have been used on a considerable scale to secure the international unification of commercial law and practice. The emergence of these specialized types of Recommendation would not make any less valuable than they have been in the past Recommendations embodying principles, policies or programmes rather than precise rules.'

⁴ Above, p. 7.

⁵ *Proceedings of the International Labour Conference*, 47th Session (1963), p. 201.

such circumstances.¹ It is alleged that the old conventions are no longer relevant to new economic exigencies² and that the new conventions are inadequate.³ To obviate this difficulty conventions are often adopted, formulating the basic underlying principles, and then a recommendation is adopted containing detailed provisions for implementation.⁴

The following are examples of subjects covered by international labour recommendations: Benefits in the Case of Employment Injury;⁵ Employment Policy;⁵ Hygiene in Commerce and Offices;⁶ The Guarding of Machinery;⁷ Termination of Employment at the Initiative of the Employer;⁸ Prohibition of the Sale, Hire and Use of Inadequately Guarded Machinery;⁹ Employment Agencies;¹⁰ Unemployment;¹¹ Recommendation concerning Public Works (National Planning);¹² The Prevention of Industrial Accidents;¹³ the Protection Against Accidents of Workers Employed in Loading or Unloading Ships;¹⁴ Utilization of Spare Time;¹⁵ Childbirth;¹⁶ Labour Inspection.¹⁷ The examination of the recommendations on these subjects indicates that on the whole recommendations have been used to serve four purposes: (1) to embody general principles and objectives, many of which it would not be suitable to formulate in a convention; (2) to act as a precursor to a convention which will follow when conditions are more appropriate; (3) to act as a Model Code; (4) to supplement a convention (both will be adopted at the same time, one containing the underlying principles, the other the details concerning implementation).

The Director-General of the Organization, in his Report for 1963 and 1964 noted that 'many recommendations are now drafted with a care and precision which make them no less valuable as a basis for national action than conventions'.¹⁸ The Director-General also noted:

'There is no inherent virtue in a Convention as such as compared with a Recommendation. A Convention creates obligations in addition to establishing a standard, but in certain fields (and in particular in fields in which policy is and must remain fluid and will necessarily be greatly influenced by future changes and variations in economic conditions) a standard which can be widely accepted as such may well be more effective in practice than obligations which are unlikely to be equally widely assumed. There can be little doubt that for many years the Recommendation was regarded in the I.L.O. as a poor relation of the Convention; there has now been a great change of attitude, fore-

¹ *Proceedings of the International Labour Conference*, 47th Session, (1963), p. 199.

² *Ibid.*, 48th Session (1964), p. 336.

³ *Ibid.*, p. 372.

⁴ See *ibid.* for the Convention and Recommendation adopted by the Conference on Employment Policy.

⁵ See *ibid.*, Appendixes, for the text.

⁶ *Ibid.*, 47th Session (1963), p. 592.

⁷ *Ibid.*, p. 575.

⁸ *Ibid.*, p. 589.

⁹ *Ibid.*, p. 566.

¹⁰ *International Labour Code* (1939), p. 14.

¹¹ *Ibid.*, p. 19.

¹² *Ibid.*, p. 20.

¹³ *Ibid.*, p. 219.

¹⁴ *Ibid.*, p. 255.

¹⁵ *Ibid.*, p. 287.

¹⁶ *Ibid.*, p. 335.

¹⁷ *Ibid.*, p. 385.

¹⁸ Report of the Director-General, *Proceedings of the International Labour Conference*, 48th Session (1964), p. 171.

shadowed in my predecessor's Report to the Conference as early as 1945, but traces of the old attitude nevertheless survive in the discussions which so frequently take place when a proposal for a comprehensive and detailed Recommendation is placed before the Conference for consideration of whether it would not be preferable to adopt a Convention. . . . One may reasonably hope that . . . it is now generally recognized that the only valid principle in the matter is that each case must be decided on its merits. Considering the question in this perspective, it is of fundamental importance that the status and effectiveness of Recommendations were radically changed by the arrangements for reporting on the application of Recommendations resulting from the amendment of article 19 of the Constitution in 1946 and the steps which have been taken in more recent years to make full use of the article 19 reports on Conventions and Recommendations alike for the purpose of comprehensive surveys of questions specially selected by reason of their current importance.¹

A recommendation is a different but not an inferior instrument to a convention. It gives rise to an obligation to submit its provisions to the competent national authority. Members must inform the Director-General of measures taken to implement the recommendation. Members must also report to the Director-General, at appropriate intervals, the position of their law and practice in respect to the subject-matter of the recommendation. As a standard-setting instrument the recommendation serves an extensive variety of functions and may even act as an alternative to a convention.² However, it may be distinguished from a convention not only on the ground that it is not subject to ratification, but also because it fulfils a different purpose.

III. *Resolutions*

Resolutions are playing an increasingly important role in the work of international organizations as vehicles for collective action and instruments for recording and embodying the corporate view of a Conference. In the case of the United Nations this is explicit,³ resolutions being the primary mode of action. In the case of the International Labour Organization, resolutions play a secondary role, subsidiary to that of conventions and recommendations.

The advantages and attractions of proceeding by way of resolutions are evident. As they do not give rise to any legal obligations, not even submission to any national organ, States are much less reluctant and apprehensive about their adoption. Secondly, the versatility and flexibility of an instrument which can be adapted to serve almost any purpose, from a mandate for action to a mere exhortation or reflection of stated views, commends it to all States. Within the International Labour Organization

¹ Ibid., p. 170.

² Below, pp. 54 *et seq.*

³ Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963).

the resolution serves four principal purposes: First, to express views concerning the work and structure of the Organization itself; secondly, to deal with a subject which ultimately might be suitable for a convention or recommendation; thirdly, to deal with matters which are primarily the concern of other International Organizations; fourthly, to express a view on a subject which would be wholly inappropriate for regulation by a convention.

Examples of the first type are the Resolutions concerning:

- (a) The International Institute for Labour Studies;¹
- (b) Programmes of Technical Assistance and other I.L.O. Activities in Africa;
- (c) The Question of Equitable Geographical Distribution of Basic Elective Offices of the General Conference and the Governing Body and Equitable Geographical Representation in the Governing Body of the International Labour Office;
- (d) Problems Calling for I.L.O. Action and Structural Problems in the I.L.O.;
- (e) The Strengthening of Tripartism within the I.L.O.;
- (f) The Regional Activities of the I.L.O.;
- (g) Revision of the Constitution and the Standing Orders;
- (h) The Programme and Structure of the I.L.O.

The second type may be illustrated by the Resolutions concerning:

- (a) Minimum Living Standards and their Adjustment to the Level of Economic Growth;
- (b) Prevention of Industrial Accidents and Occupational Diseases;
- (c) The Placing on the Agenda of the Next Ordinary Session of the Conference of the Question of Hygiene in Commerce and Offices;²
- (d) The Placing on the Agenda of the Next Ordinary Session of the Conference of the Question of Benefits in Case of Industrial Accidents and Occupational Diseases;
- (e) The Maintenance of Wage Standards on the Occasion of the Reduction of Hours of Work;³
- (f) Opium Smoking by Workers;
- (g) The Principles Regarding Women Workers;
- (h) The Prevention and Treatment of Venereal Diseases in the Mercantile Marine;
- (i) The Uniformity of the Protection of Workers in China.

¹ *Proceedings of the International Labour Conference*, 48th Session (1964), Appendixes: Resolutions, p. ix.

² *Ibid.*, 47th session (1963), p. 638.

³ *International Labour Code* (1939), pp. 559-64.

Resolutions exemplifying the third function are those relating to:

- (a) The International Co-operation Year and the Twentieth Anniversary of the United Nations;¹
- (b) Assistance to Educational Programmes;
- (c) Action to Remedy the Economic Crisis;²
- (d) The Calling of Economic Conferences;³ and the Resolution Addressed to the World Monetary and Economic Conference.⁴

A resolution of the fourth type (i.e. formulating standards of social policy on subjects which it would be inappropriate to deal with in the form of a convention or recommendation) would be one relating to the organization of national labour departments, one clearly fundamental to the effectiveness of all the work of the International Labour Organization but unsuitable for more formal international action on account of its close relationship with questions of national administrative organization.⁵

Apart from resolutions adopted by the Conference there are resolutions of other bodies:

‘. . . standards of policy have been expressed in the form of resolutions of the International Labour Conference; resolutions and conclusions adopted by expert committees and ad hoc conferences; resolutions and reports adopted by bodies representing the views and interests of particular industries, sectors of the economy or types of worker, such as the Joint Maritime Commission, the Industrial Committees, the Permanent Agricultural Committee and the Advisory Committee on Salaried Employees and Professional Workers; resolutions and reports of regional conferences and regional technical meetings, resolutions of autonomous bodies dealing with social security questions; and model codes on such matters as health and safety regulations. . . .’⁶

The legal basis for the adoption and promulgation of resolutions by the Conference is not an actual provision in the Constitution but is based on the practice of the Organization. The practice has varied considerably in intensity. It has existed since the beginning of the Organization and its constitutionality and usefulness was challenged at an early date.⁷ However, it survived, and during the second decade of the work of the Organization there was a tendency for the number and importance of such resolutions to increase and the Standing Orders of the Conference were modified in

¹ *Proceedings of the International Labour Conference*, 48th Session (1964). Appendixes: Resolutions, p. ii.

² *International Labour Code* (1939), p. 565.

³ *Ibid.*, p. 567.

⁴ *Ibid.*, p. 569. And see *International Labour Code* (1951), vol. 1, p. cxv: ‘These resolutions are necessarily somewhat different in character from the resolutions formulating standards of social policy. They deal with questions the primary responsibility for dealing with which has always rested with other international organizations.’

⁵ *Ibid.*, p. lxxxii.

⁶ *Ibid.*, p. lxxxiii.

⁷ *Minutes of the Governing Body of the I.L.O.* (1962), pp. 363-4, 423-4.

order to ensure that resolutions received proper consideration before adoption.¹ This tendency was further accentuated during the Second World War and the immediate post-war period.² In the past five or more years the number of resolutions submitted to the Conference has grown so extensively that the machinery for their examination has had to be reformed. As the Director-General said in his Report to the Conference for 1963:

‘These difficulties have arisen from the increasing number of resolutions submitted, the increasing proportion of resolutions raising political questions of a far-reaching character in which the I.L.O. has an interest but as regards which it does not have the major responsibility for international action, and the increased size of the Resolutions Committee . . . the cumulative effect of these factors has been to place a greatly increased burden on the Resolutions Committee and to make it difficult for it to complete its work within the time available in a manner satisfactory to the Conference as a whole.’³

The initiative in submitting resolutions rested with the individual delegate; there were therefore 444 potential sponsors of resolutions and there was no limitation on the number of resolutions each delegate might sponsor. As regards subject-matter, the only limitation was the power of the Resolutions Committee (which it has shown itself reluctant to exercise) to recommend that a resolution was not within the competence of the Conference. The problem was considered by the Governing Body of the Organization in November 1962,⁴ which proposed that the order in which resolutions were to be considered, and the first five resolutions to be considered, should be determined by ballot without discussion, while the order in which subsequent resolutions were to be considered should be determined by the Resolutions Committee on the basis of the recommendations of a working party.⁵ Secondly, it proposed that the Committee should be empowered to reduce the time-limit for speeches on a specific topic from ten to five minutes and that after a motion for the closure had been carried, only the sponsor of the motion, resolution or amendment should have the right to speak on the question under discussion.⁵ Thirdly, it proposed that the Standing Orders should be amended to provide that the Resolutions Committee should terminate its work on the Saturday preceding the closing of the Conference and that if any resolution had not been considered by the Committee by that date, the Conference should

¹ *International Labour Code* (1951), vol. 1, p. cxiv.

² *Ibid.*: ‘As examples may be mentioned the comprehensive resolution on the protection of children and young workers adopted by the Conference in 1945 . . . and the resolution on freedom of association adopted by the Conference in 1947 . . . as the first stage in the post-war programme of work of the organization in the field of industrial relations.’

³ Report of the Director-General, *Proceedings of the International Labour Conference*, 48th Session (1964), pp. 138–9.

⁴ *Minutes of the Governing Body of the I.L.O.*, 151st Session (1962), P.V.3, p. 8.

⁵ Report of the Director-General, *Proceedings of the International Labour Conference*, 47th Session (1963), p. 140.

not discuss or act upon that resolution.¹ Although these proposals were adopted, it was not without some dissension.²

The suitability of certain subjects for resolutions by the Conference was also adverted to by the Director-General:

'The basic issue is how far the Conference should take the world for its parish and express the views of the I.L.O. on some of the most difficult, controversial and explosive political questions of the day. Most, if not all, of these questions have some social implications or aspect; there are therefore few of them concerning which the I.L.O., or at least a majority of the Conference, may not have something, and perhaps something important, to say; but as regards many of them the I.L.O. alone can take little or no useful or constructive action . . . no procedural or institutional device can adequately replace a wise restraint on the submission to the Conference of proposals relating to matters in respect of which the responsibility for action on behalf of the United Nations family rests primarily with the political organs of the United Nations. . . .'³

The Resolutions Committee may reject a resolution on grounds of inexpediency or the incompetence of the Conference.⁴

¹ Ibid., p. 141.

² Ibid., pp. 257-63.

³ Report of the Director-General, *ibid.*, p. 141.

⁴ Standing Orders of the International Labour Conference, Article 17. Resolutions relating to matters not included in an item on the Agenda:

'1. (1) No resolution relating to a matter not included in an item on the agenda of the Conference shall be moved at any sitting of the Conference unless a copy of the resolution has been deposited with the Director-General of the International Labour Office at least 15 days before the opening of the session of the Conference.

'(2) Copies of all resolutions shall be available to delegates at the International Labour Office not more than 48 hours after the expiry of the time-limit laid down in the preceding subparagraph: provided that the Director-General may decide to withhold circulation of the text of a particular resolution pending consultation of the Officers of the Governing Body.

'(3) When circulation of a particular resolution has been withheld pending consultation of the Officers of the Governing Body, that resolution shall, unless the Officers decide unanimously to the contrary, be available to delegates not later than the date fixed for the opening of the session of the Conference.

'2. The President may, with the approval of the three Vice-Presidents, permit a resolution relating to a matter not included in an item on the agenda of the Conference to be moved although it has not been deposited as required by paragraph 1 (1) if it relates either to urgent matters or to matters of an entirely formal nature.

'3. All resolutions relating to matters not included in an item on the agenda shall be referred by the Conference for report to a Resolutions Committee.

'4. The Resolutions Committee shall consider in respect of each resolution whether it satisfies the conditions of receivability set forth in paragraph 1.

'5. (1) If members of the Resolutions Committee having not less than one-quarter of the voting power of the Committee move that the Committee should take the view that a resolution is not within the competence of the Conference, or that its adoption is inexpedient, this preliminary question shall be determined by the Committee after hearing the author, or, where there are several, one of the authors of the resolution, not more than one speaker for and against the motion from each group, and the reply of the author or one of the authors.

'(2) A recommendation by the Resolutions Committee that a resolution is not within the competence of the Conference, or that its adoption is inexpedient, shall be accompanied by a report of the discussion in the Committee and shall be put to the vote in the Conference without debate.

'6. The Resolutions Committee may, after hearing the author or authors of a resolution, amend it in form or substance in such manner as it may consider desirable.

'7. It shall be the special duty of the Resolutions Committee to distinguish by appropriate

Although resolutions only require a simple majority for their adoption¹ and do not possess the same authority as conventions or recommendations, or give rise to any obligation concerning submission to a national authority or obligation to report, yet a system has been devised in practice to facilitate and ensure the implementation of resolutions which have been adopted by the Conference. At the 1962 Conference of the Organization a resolution was submitted by the Resolutions Committee to the General Conference to the following effect:

'The General Conference of the International Labour Organization . . . invites the Governing Body to request the Director-General to include each year in his annual Report to the Conference a chapter setting out the steps taken to give effect to the resolutions of previous sessions and the results achieved, and to include in his Report to the 47th Session of the Conference such information about the resolutions adopted during the last five sessions of the Conference.'²

Since that time the Director-General, in his Annual Report, has included a chapter on the action taken on resolutions adopted by the Conference; and in his 1965 Report the forty-fourth to the forty-eighth Sessions are covered.³ The introduction of this element of supervision together with the restriction on the number of resolutions which may be submitted to the Conference⁴ has served to make the resolutions procedure much more efficient and effective. This fact together with the range of the subjects dealt with by resolutions, has enabled them to play a significant, if subsidiary, role in the work of the Organization.

However, in conclusion, three points need to be emphasized in order to place resolutions in their correct perspective in the work of the Organization. First, it must be borne in mind that resolutions adopted by the Conference are in no sense analogous to resolutions of the General Assembly of the United Nations. There can be nothing even comparable in importance or scope to the Declaration of Legal Principles concerning Activities in Space adopted by the General Assembly in 1963. The primary instruments adopted by the Conference of the International Labour Organization are conventions and recommendations; resolutions are merely ancillary. Secondly, it will be apparent from the examples already cited above that the resolutions of the Conference cover a broad spectrum of subjects, a large number of which are not concerned with the standard-setting function of the Organization. In this context one may also

drafting, resolutions the adoption of which by the Conference would involve exact legal consequences from resolutions intended for consideration by the Governing Body, government or any other body, but not creating any legal obligation.

'8. The Resolutions Committee shall submit a report to the Conference.'

¹ Standing Orders of the Conference of the International Labour Organization, Article 21.

² *Proceedings of the International Labour Conference*, 46th Session (1962), p. 638.

³ Report of the Director-General, *ibid.*, 49th Session (1965), pp. 88-107.

⁴ See above, p. 28. In 1962 nineteen resolutions had been submitted to the Conference.

refer to the resolutions adopted by the Industrial Committees and Regional Conferences of the Organization. Thirdly, there are a limited number of resolutions which play a part in the gestation of what subsequently become conventions or recommendations. Here one may distinguish between resolutions which are substantive precursors of later standards (for example, the Employment Policy adopted in 1961) and the purely formal resolutions, which are part of the double discussion mechanism for placing an item with regard to which conclusions had been adopted at the end of a first discussion, on the agenda of the following session of the Conference for a second discussion and adoption.

IV. *Flexibility Clauses in International Labour Conventions*¹

One of the arguments advanced against permitting States to append reservations to conventions, is that conventions usually incorporate a 'flexibility clause'.² Such a clause is specifically designed to take cognizance of and to accommodate the widely divergent and disparate economic and social conditions which prevail between States. Although this problem has now been exacerbated and a new element of urgency introduced with the newly independent States, it had already been anticipated in a number of provisions of the 1919 Constitution.

Article 19 (3) of the Constitution provides that 'in framing any Recommendation or draft Convention of general application, the Convention shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different, and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries'.³ India attached particular importance to the inclusion of such a provision and considered it a safeguard which would facilitate her acceptance of the Constitution.⁴ Initially, the provision was interpreted as limited to countries explicitly named in the convention and the modifications of the normal standard prescribed by the convention were stated in detail. For example, in the Hours of Work (Industry) Convention, 1919, seven countries, mentioned by name, were permitted to deviate from and to modify the normal standard.⁵ Several other examples may also be

¹ The author wishes to acknowledge that in this section dealing with flexibility clauses, he is particularly indebted to Dr. C. W. Jenks who generously allowed him to make use of his paper on this subject for the International Labour Office.

² See below, p. 77.

³ The text of Article 19 (3) of the present Constitution is the same, except that the word 'Convention' replaces 'draft convention'.

⁴ See above, p. 9.

⁵ The Hours of Work (Industry) Convention, 1919, Article 9: 'In the application of this Convention to Japan the following modifications and conditions shall obtain . . .'; Article 10: 'In

given of the use of this provision during the early years of the Organization.¹ However, the application of the provision proved unpopular and although it was retained in the revising of two conventions in 1937² and of two more in 1948³ it has been employed only in two new conventions⁴ since the early nineteen-twenties. For practical purposes, in view of the large number of newly independent States, this provision may now be regarded as defunct.

A second, more extensive construction could be ascribed to the words of Article 19 (3). They could be interpreted as applicable to any country, even if it is not specifically mentioned by name, where the conditions mentioned in Article 19 (3) prevail. An example occurs in the Night Work (Women) Convention, 1919, Article 7 of which provides that, 'in countries where the climate renders work by day particularly trying to the health the night period may be shorter than prescribed in the above articles, provided that compensatory rest is accorded during the day'. A second example is to be found in Article 3 (4) of the Night Work of Young Persons (Industry) Convention, 1919, which states that, 'in those tropical countries in which work is suspended during the middle of the day, the night period may be shorter than eleven hours if compensatory rest is accorded during the day'. However, it was in 1946 that the first deliberate attempt was made to include in a group of conventions (the Medical Examination of Young Persons (Industry) Convention, 1946; the Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946; and the Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946) a provision for modification of the normal standard, not limited to countries expressly mentioned by name, but applicable to 'the case of a member the territory of which includes large areas where, by reason of the sparseness of the population or the stage of development of the area, the competent authority considers it impracticable to enforce the provisions of this Con-

British India the principle of a sixty-hour week shall be adopted for all workers in the industries at present covered by the factory acts administered by the Government of India . . .'; Article 11: 'The provisions of this Convention shall not apply to China, Persia, and Siam, but provisions limiting the hours of work in these countries shall be considered at a future meeting of the General Conference'; Article 12: 'In the application of this Convention to Greece the date at which its provisions shall be brought into operation in accordance with Article 19 may be extended to not later than 1 July 1923, in the case of the following industrial undertakings . . .'; Article 13: 'In the application of this Convention to Rumania the date at which its provisions shall be brought into operation in accordance with Article 19 may be extended to not later than 1 July 1924'.

¹ Night Work (Women) Convention, 1919, Article 5; Minimum Age (Industry) Convention, 1919, Articles 5 and 6; Night Work of Young Persons (Industry) Convention, 1919, Articles 5 and 6.

² Minimum Age (Industry) Convention (Revised), 1937, Articles 7 and 8, and Minimum Age (non-Industrial Employment) Convention (Revised), 1937, Article 9.

³ Night Work (Women) Convention (Revised), 1948, Articles 9, 10 and 11, and Night Work of Young Persons (Industry) Convention (Revised), 1948, Articles 7, 8 and 9.

⁴ Minimum Age (non-Industrial Employment) Convention, 1932, Article 9, and Medical Examination of Young Persons (Industry) Convention, 1946, Article 8.

vention, the authority may exempt such areas from the application of the Convention . . .'. Since 1946, only the Social Security (Minimum Standards) Convention of 1952 contains a similar clause. The inference that may be drawn in practice is that the influence of Article 19 (3) on the formulation of international labour conventions has not been substantial.¹

Two further provisions in the 1919 Constitution were designed to mitigate the rigour of obligations embodied in labour conventions. The first provision gave discretion to a federal State, where the power to enter into conventions on labour matters was subject to limitations, to treat a draft convention to which such limitations applied as a recommendation.² The genesis and subsequent development and amendment of this Article have already been discussed.³

The second provision, Article 35 of the 1919 Constitution, frequently referred to as the Colonial Application Clause, obliged members to apply the convention which they had ratified to their colonies, protectorates and possessions which were not fully self-governing, except where owing to the local conditions the convention might be inapplicable or subject to such modifications as might be necessary to adapt the convention to local conditions. Each member undertook to notify the International Labour Office of the action taken in respect of each of its colonies, protectorates and possessions which were not fully self-governing. This article was superseded by a more elaborate, technical and detailed article when the Constitution was amended in 1946.⁴ The new Article took cognizance of a case where the subject-matter of the convention was within the self-governing powers of the territory.⁵ The amended Article also contained detailed

¹ *International Labour Code* (1951), pp. lxxviii–lxxix: 'No substantial change was made in this provision when the Constitution was amended in 1946. The provision has, however, been applied only on a limited scale and exclusively in respect of certain Asian and Middle Eastern countries. Changes in political and economic conditions have made it increasingly difficult to secure general approval for differing standards for different parts of the world. . . .'

² See Article 19 (9) of the 1919 Constitution.

³ See above, p. 7.

⁴ The first three paragraphs of the new Article state that: '1. The members undertake that Conventions which they have ratified in accordance with the provisions of this Constitution shall be applied to the non-metropolitan territories for whose international relations they are responsible, including any trust territories for which they are the administering authority. . . . 2. Each member which ratifies a Convention shall as soon as possible after ratification communicate to the Director-General of the International Labour Office a declaration stating in respect of the territories other than those referred to in paragraphs 4 and 5 below the extent to which it undertakes that the provisions of the Convention shall be applied and giving such particulars as may be prescribed by the Convention. 3. Each member which has communicated a declaration in virtue of the preceding paragraph may from time to time, in accordance with the terms of the Convention, communicate a further declaration modifying the terms of any former declaration and stating the present position in respect of such territories.'

⁵ Article 35 (4): 'Where the subject matter of the Convention is within the self-governing powers of any non-metropolitan territory the member responsible for the international relations of that territory shall bring the Convention to the notice of the government of the territory as soon as possible with a view to the enactment of legislation or other action by such government. Thereafter the member, in agreement with the government of the territory, may communicate to

provisions for the transmission of declarations to the International Labour Office stating the extent to which obligations had been accepted in respect of non-metropolitan territories.¹ Both the original Article and the amended Article contained what might be called a flexibility clause, permitting modification of the obligations contained in a convention when this was necessary to adapt the convention to local conditions.² It is interesting to note that in an extensive survey made by the Labour Office in 1959, concerning the influence of Article 35 in the application of conventions in non-metropolitan territories, it was stated that 1,151 declarations of application without modification and 230 declarations of applications with modifications had been received as from April 1959.³ A further amendment in 1964 expunged Article 35 from the Constitution. However, the substance of Article 35 was reformulated and incorporated under Article 19 of the Constitution.⁴ The clause permitting flexibility in the application of a convention, in order to adapt it to local conditions, is retained in substance although expressed in different terms.⁵

The need for flexibility, as a general objective to be pursued in the formulation and application of labour conventions, was mentioned in the Constitution on two occasions. First, in the declaration of general principles contained in Article 41, which states that 'they recognize that differences of climate, habits and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment. But, holding as they do, that labour should not be regarded merely as an article of commerce, they think that there are methods and principles for regulating labour conditions which all industrial communities should endeavour to apply, so far as their special circumstances will permit.' The second expression of flexibility as a general concept was contained in the Declaration of Philadelphia of 1946. This Declaration, which is now an integral part of the Constitution and embodies the aims and objectives of the Organization, concludes with the affirmation 'that the principles set forth in this Declaration are fully applicable to all

the Director-General of the International Labour Office a declaration accepting the obligations of the Convention on behalf of such territory.'

¹ Article 35 (5): 'A declaration accepting the obligations of any Convention may be communicated to the Director-General of the International Labour Office: (a) by two or more members of the Organisation in respect of any territory which is under their joint authority; (b) by any international authority responsible for the administration of any territory, in virtue of the Charter of the United Nations or otherwise, in respect of any such territory.'

² Article 35 (1): '... except where the subject-matter of the Convention is within the self-governing powers of the territory or the Convention is inapplicable owing to the local conditions or subject to such modifications as may be necessary to adapt the Convention to local conditions.'

³ See Influence of Article 35 of the Constitution of the I.L.O. in the application of Conventions in Non-Metropolitan Territories.

⁴ *Proceedings of the International Labour Conference*, 48th Session (1964), p. 830.

⁵ The new text states: '... members ratifying Conventions shall accept their provisions so far as practicable in respect of all territories for whose international relations they are responsible.'

peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilised world'.

Apart from these two general affirmations of flexibility and the three specific Articles discussed above, it may also be relevant in this context to refer to the views of the Conference Delegation on Constitutional Questions in 1946.¹ The question arose in three ways; (1) in connection with the application of conventions by means of collective agreements; (2) in connection with a proposal that some procedure should be established which would enable governments to ratify conventions on the basis of legislation which, though not fulfilling in detail the requirements of the convention concerned, had been found by an appropriate organ of the International Labour Organization to be substantially equivalent; and (3) in connection with the relationship between conventions and recommendations.

Concerning collective agreements, the basic dilemma, as stated by the Delegation, was that 'whereas a collective agreement, unless its authority has been extended by the State, represents a mutual obligation only between the parties to the agreement, the ratification of an international labour convention involves an obligation by the State to all other States which have ratified the convention. . . . How far can the State assume responsibility for a collective agreement, as a basis for the acceptance of precise international obligations for a substantial period of time, without destroying the freedom of relations between employers' organisations and trade unions. . . .?'² However, the Delegation concluded that the issues involved were so complex in character that it was not in a position to make any definite recommendation on the subject beyond stating that it considered the publication by the International Labour Organization of a thorough study of current tendencies concerning the matter to be extremely desirable for a variety of reasons.³

¹ Ibid., 29th Session (Montreal, 1946), Report on Constitutional Questions, pp. 48-50.

² Ibid. The Report continues: 'The answer to these questions may differ in respect of different types of subject matter. Some provisions of collective agreements, notably those relating to wages and to a lesser extent those relating to hours of work tend to be changed at frequent intervals; others, such as those regulating methods of wage payment, overtime, apprenticeship and discipline, may continue with little or no modification for substantial periods and represent standards which, while likely to be further improved in the future, are unlikely to deteriorate in time of peace. The answers may also differ considerably from industry to industry and particularly from one country to another. . . .' See also International Labour Organization, *Collective Agreements* (Studies and Reports, Series A (Industrial Relations), No. 39, 1936).

³ See Jenks, 'The Application of International Labour Conventions by means of Collective Agreements', *Festgabe für A. N. Makarov* (The Max Planck Institute, 1958), pp. 22-49. Dr. Jenks notes nine different types of provisions relating to collective agreements which appear in existing conventions.

The Delegation also considered the question of establishing some procedure which would enable governments to ratify conventions on the basis of legislation which, although not fulfilling in detail the requirements of the convention concerned, had been found by an appropriate organ of the International Labour Organization to be substantially equivalent to the requirements of the Convention measured by the level of social protection afforded by the legislation.¹ Here also, the Delegation noted a number of difficulties. By what criterion was it to be determined whether legislation was equivalent? Who was to be the judge? Who was to be authorized to investigate the precise facts in the event of a dispute on the question whether substantial equivalence existed in practice? A more serious difficulty concerned the element of reciprocity and mutuality of obligations involved in labour conventions. These instruments give rise to precise, legal obligations between States and an arrangement permitting ratification on the basis of substantially equivalent compliance with a convention would only serve to perpetrate discrepancies and inequality in the obligations assumed by States under a convention and impair the uniformity of international standards.² The principal purpose of adopting such a new procedure would be to ensure that a government would receive credit internationally for legislation which approximated to or was superior³ to, but differed in detail from, standards embodied in conventions. However, it was pointed out that this purpose could also be achieved through the new system of reports on unratified conventions. An arrangement could be devised for the examination of these reports whereby formal note could be taken of the fact that the situation disclosed by them was not less satisfactory than the requirements of the convention. As a result, the Delegation considered it unnecessary and premature to introduce a constitutional amendment giving effect to the suggestion of ratification by way of substantial equivalence and compliance with the terms of a convention. Instead, it was suggested that, in the first instance, the problem should be dealt with by the inclusion of appropriate clauses in individual conventions rather than by the adoption of a constitutional amendment.⁴

¹ *Proceedings of the International Labour Conference*, 29th Session, (Montreal, 1946), Report on Constitutional Questions, pp. 50-53.

² *Ibid.*: '... It may consider that the existence of arrangements permitting ratification on such a basis would, in addition to impairing the value of Conventions as a means of securing a measure of international uniformity, result in a gradual whittling away of Convention standards and gravely weaken the whole structure of obligations created by ratified Conventions.'

³ *Ibid.*: 'The position of members where standards in respect of the subject matter of a Convention are higher than those provided for in the Convention presents a special problem. In such cases the ratification of a Convention prescribing an international minimum standard lower than the standard in force nationally may involve disproportionate political effort because of the difficulty of rousing interest in the subject or even be politically impossible because it is feared that the approval given to the minimum standard, even as an international minimum standard operative as a floor applicable to widely varying national conditions, will tend to impair the authority of the higher national standard.'

⁴ *Ibid.*

The Delegation also drew attention to the manner in which the relationship between recommendations and conventions could be used in order to secure a greater measure of flexibility. The Delegation particularly advocated the adoption of experimental recommendations prior to the adoption of conventions,¹ or the adoption of more varied types of recommendations as an alternative to the adoption of conventions in certain cases.² Concerning experimental recommendations, the Delegation suggested: 'One useful device for ensuring thorough preparation of Conventions is to begin by adopting a Recommendation with a view to embodying progressively in Conventions at a later stage those of its provisions in the case of which such action appears appropriate in the light of the experience gained as reflected in the reports made by Members on the application of the Recommendation. This device makes it possible to draw upon a more substantial and varied body of practical experience than can be tapped by seeking replies from Governments to a questionnaire.' The amended text of Article 19 recommended by the Delegation, defines the purpose of recommendations as being 'to meet circumstances where the subject, or an aspect of it dealt with is not considered suitable or appropriate at that time for a Convention'. The Delegation hopes that this amended text will encourage recourse, in appropriate cases, to the device of preparing the way by experimental recommendations for the later adoption of conventions as a well-recognized feature of the procedure of the International Labour Organization.³

It is now necessary to examine to what extent the specific and general constitutional provisions of the Organizations and the views advanced by the Delegation on Constitutional Questions in 1946 have been implemented and developed in practice.

The usual international labour convention is drafted in such a way as to afford the maximum amount of flexibility consonant with the assumption by a State of a real measure of obligation. Consequently, the convention is often short in form and restricted to the formulation of a few broad obligations. It is not encumbered by unnecessary details which might only serve to impede ratification and may be dealt with more appropriately in the form of a recommendation. The normal convention is composed of a brief preamble, a few general obligations, a number of exceptions, implementing provisions which allow wide discretion to the national authority and the final clauses concerning ratification, denunciation, duration and revision.⁴

In a few conventions, the obligation assumed is so minimal and

¹ Ibid., p. 62.

² Ibid., pp. 62-64.

³ Ibid., p. 62.

⁴ This description is true of the majority of conventions adopted by the International Labour Conference since 1919. See, for example, the first convention adopted by the Conference, the Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week.

amorphous as to be barely discernible. As an example, one may quote conventions where the basic obligation is to promote and pursue a definite policy rather than to comply with a defined standard. This is quite explicit in Article 1 of the Convention Concerning Employment Policy 1964:

'1. With a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and under-employment, each member shall declare and pursue, as major goal, an active policy designed to promote full, productive and freely chosen employment.

2. The said policy shall aim at ensuring that

(a) There is work for all who are available for and seeking work;

(b) Such work is as productive as possible;

(c) There is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in a job for which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin.

3. The said policy shall take due account of the stage and level of economic development and the mutual relationships between employment objectives and other economic and social objectives, and shall be pursued by methods that are appropriate to national conditions and practices.'

There are two other conventions of a similar nature; the Convention Concerning Discrimination in Respect of Employment and Occupation, 1958, and the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951. Under the first Convention¹ the ratifying parties undertake to declare and pursue a national policy designed to promote, by the appropriate methods, equality of opportunity and treatment in respect of employment and occupation. Under the second Convention² the only obligation arising on ratification is to promote, and to ensure as far as possible, the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

In connection with these three conventions for the promotion of policies, it may be relevant to mention what has been called the 'convention of principle' of which the Forty Hour Week Convention 1935 is the unique example.³ Under Article 1, a member which ratifies the convention declares its approval of two objectives. First, the principle of a forty-hour week, to be applied in such a manner that the standard of living is not reduced as a consequence. Secondly, the taking or facilitating of such measures as may be deemed appropriate to secure this objective. However, unlike the promotional policy convention, the convention of principle has not succeeded in practice in attracting many ratifications.⁴

¹ Article 2 of the Convention Concerning Discrimination in Respect of Employment and Occupation.

² Article 2 of the Convention Concerning Equal Remuneration for Men and Women for Work of Equal Value.

³ Article 1 of the Convention Concerning the Reduction of Hours of Work to Forty a Week.

⁴ In fact it has succeeded in obtaining only four ratifications.

A scrutiny of the language employed in the drafting of international labour conventions indicates that there is a deliberate and frequent tendency to choose words for their qualities of imprecision rather than precision. Vague and accommodating terms are liberally deployed throughout successive conventions, as may be instanced by the abundant recourse to such adjectives as 'reasonable', 'appropriate', 'adequate', 'effective', 'fair', 'practicable', 'necessary', 'sufficient', 'suitable' and 'proper'. The Accommodation on Board Fishing Vessels Convention, 1966, requires: 'sufficient drainage shall be provided';¹ 'sleeping rooms and mess rooms shall be adequately ventilated';² 'sleeping rooms shall be so planned and equipped as to ensure reasonable comfort';³ 'mess rooms shall be as close as practicable to the galley';⁴ 'satisfactory cooling equipment shall be provided on board';⁵ 'the galley shall be provided with suitable facilities for the preparation of hot drinks for the crew at all times'.⁶ The Placing of Seamen Convention, 1920, states: 'each member which ratifies this Convention agrees that there shall be organised and maintained an efficient and adequate system of public employment offices';⁷ 'each member which ratifies this Convention agrees to take all practicable measures to abolish the practice of finding employment for seamen as a commercial enterprise for pecuniary gain';⁸ 'the necessary guarantees for protecting all parties concerned shall be included in the contract of engagement . . . and proper facilities shall be assured to seamen for examining such contract'.⁹ The Labour Inspection Convention, 1947, provides: 'the number of labour inspectors shall be sufficient to secure the effective discharge of the duties of the inspectorate';¹⁰ 'labour inspectors provided with proper credentials shall be empowered to . . .';¹¹ 'labour inspectors shall be adequately trained for the performance of their duties'.¹² The Accommodation of Ships' Crews Convention (Revised), 1949, makes use of the terms adequate,¹³ sufficient,¹⁴ practicable,¹⁵ properly,¹⁶ satisfactorily,¹⁷ suitable¹⁸ and reasonable.¹⁹ The Right to Organize and Collective Bargaining Convention, 1949, requires machinery and measures 'appropriate to national conditions'²⁰ to be established and taken where necessary. The Convention concerning Social Policy in non-Metropolitan

¹ Article 6 (15) of the Convention Concerning Accommodation on Board Fishing Vessels.

² Ibid., Article 7 (1).

³ Ibid., Article 10 (19).

⁴ Ibid., Article 11 (5).

⁵ Ibid., Article 16 (1).

⁶ Ibid., Article 16 (4).

⁷ Article 4 of the Convention for Establishing Facilities for Finding Employment for Seamen.

⁸ Ibid., Article 3 (2).

⁹ Ibid., Article 7.

¹⁰ Article 10 of the Convention Concerning Labour Inspection in Industry and Commerce.

¹¹ Ibid., Article 12.

¹² Ibid., Article 7 (3).

¹³ Article 6 of the Convention Concerning Crew Accommodation on Board Ship (Revised 1949).

¹⁴ Ibid., Article 6 (13).

¹⁵ Ibid., Article 8 (2).

¹⁶ Ibid., Article 8 (4).

¹⁷ Ibid., Article 8 (5).

¹⁸ Ibid., Article 10 (20).

¹⁹ Ibid., Article 10 (21).

²⁰ Articles 3 and 4 of the Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949.

Territories, 1947, employs the terms, appropriate,¹ reasonable,² practicable,³ possible,⁴ necessary⁵ and adequate.⁶ Many other examples⁷ may also be found of the purposeful use of flexible language designed to promote the widespread ratification of labour conventions under widely disparate conditions.

In addition, there is sometimes a whole Article couched in the broadest terms in order to confer the widest latitude and discretion on the competent national authority when implementing the convention. An example is Article 28 of the Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, which provides that 'the nature and the scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country'. The extent to which the scope and application of a convention is, in fact, determined by the competent national authority will be discussed in more detail later.⁸ Flexibility is also obtained by various special devices. Some conventions contain combinations and permutations of such devices. The Convention Concerning Benefits in the Case of Employment Injury, 1964, permits temporary exceptions,⁹ permanent exceptions, and a specified percentage of compliance.¹⁰ The Fee-Charging Employment Agencies Convention (Revised), 1949, permits exceptions,¹¹ ratification in parts¹² and exemption of certain geographical areas.¹³ The Convention Concerning Minimum Standards of Social Security, 1952, permits ratification in parts,¹⁴ temporary exceptions¹⁵ and a specified percentage of compliance.¹⁶ Thus by broad drafting, in limiting the normal convention to the formulation of a few general principles, expressed in rather amorphous terms and the inclusion of one or more special devices, the maximum amount of flexibility is achieved.

These special flexibility devices will now be considered in more detail under the following heads: scope; methods of implementation; ratification

¹ Article 3 (4) of the Convention Concerning Social Policy in non-Metropolitan Territories.

² Ibid.

³ Ibid., Article 7 (1).

⁴ Ibid., Article 4.

⁵ Ibid., Article 14 (3).

⁶ Ibid., Article 14 (2).

⁷ Convention Concerning the Protection against Accidents of Workers Employed in Loading or Unloading Ships, 1929; Convention Concerning the Regulation of Certain Special Systems of Recruiting Workers, 1936; Convention Concerning the Abolition of Penal Sanctions for Breaches of Contract of Employment by Indigenous Workers, 1955; Convention Concerning Conditions of Employment of Plantation Workers, 1958; Convention Concerning Hygiene in Commerce and Offices, 1964.

⁸ See below, pp. 41 et seq.

⁹ Article 2 of the Convention Concerning Benefits in the Case of Employment Injury, 1964.

¹⁰ Ibid., Articles 2 and 3.

¹¹ Ibid., Article 5.

¹² Article 5 of the Convention Concerning Fee-Charging Employment Agencies (Revised), 1949.

¹³ Ibid., Article 2.

¹⁴ Ibid., Article 15.

¹⁵ Article 2 of the Convention Concerning Minimum Standards of Social Security, 1952.

¹⁶ Ibid., Article 3.

by parts; specific countries; special circumstances; new legislation; combination of conventions and recommendations; geographical coverage; federal States; emergency clauses; specified percentage of compliance; and transitory provisions.

1. *Scope of Application*

(a) *Broad provisions.* A number of conventions confer considerable discretion on the competent national authority concerning the interpretation, definition and application of their provisions by reference to special local circumstances. Clauses explicitly empowering the national authority to define the scope of a convention may be found in the first Convention adopted by the Labour Conference in 1919. Article (2) of the Hours of Work (Industry) Convention, 1919, provides: 'The competent authority in each country shall define the line of decision which separates industry from commerce and agriculture.' Similar clauses may be found in fifteen other conventions.¹

In 1936 a variation of this clause was included in the Reduction of Hours of Work (Public Works) Convention. Article 1 of that Convention provided:

'1. This Convention applies to persons directly employed on building or civil engineering works financed or subsidised by central Governments.

'2. For the purpose of this Convention the precise scope of the terms 'building or civil engineering', 'financed' and 'subsidised' shall be delimited by the competent authority after consultation with the organisations of employers and workers concerned where such exist.'

This revised formula appeared in yet another form in Article 1 (6) of the Reduction of Hours of Work (Textiles) Convention, 1937, which provides: 'In any case in which it is doubtful whether an undertaking or branch of an undertaking fulfils the condition stated in paragraph 2 of this Article, the question shall be determined by the competent authority after consultation with the organisations of employers and workers concerned where such exist.'

The same clause appears in Article 1 (2) of the Convention concerning Seafarers' National Identity Documents, 1958. In 1957, in the Weekly Rest in Commerce and Offices Convention two of the definition formulae mentioned above were combined. Article 4 provides:

'(1) Where necessary appropriate arrangements shall be made to define the line which separates the establishment to which this Convention applies from other establishments.

'(2) In any case in which it is doubtful whether an establishment, institution or administrative service is one to which this Convention applies, the question shall be settled either by the competent authority after consultation with the representative

¹ See below, p. 42, n.1, for a number of examples.

organisations of employers and workers concerned, where such exist, or in any other manner which is consistent with national law and practice.'

The most recent convention adopted by the Labour Conference, the Convention Concerning Accommodation on Board Fishing Vessels, 1966, also includes a provision authorizing the national authority to determine its scope. Article 1 (3) states:

'(1) National laws or regulations shall determine when ships and boats are to be regarded as sea-going for the purpose of this Convention.

'(2) This Convention does not apply to ships and boats of less than 75 tons. Provided that the Convention shall be applied to ships and boats of between 25 and 75 tons where the competent authority determines after consultation with the fishing-vessel owners' and fishermen's organisations, where such exist, that this is reasonable and practicable.'

One may also find a number of other examples in recent conventions.¹

(b) *Exemptions.* The number and variety of temporary and permanent exemption clauses contained in international labour conventions are so extensive that it must suffice merely to give illustrations of the principal types. The point of departure once again is the first convention drafted in 1919. Article 6 of the Hours of Work (Industry) Convention, 1919, provides:

'Regulations made by the public authority shall determine for industrial undertakings—(a) the permanent exceptions that may be allowed in preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working of an establishment, or for certain classes of workers whose work is essentially intermittent; (b) the temporary exceptions that may be allowed, so that establishments may deal with exceptional cases of pressure of work.'

Equally broad language is used in Article 2 of the White Lead (Painting)

¹ Article 1 (3) of the Convention Concerning the Employment of Women before and after Childbirth, 1919; Article 1 (2) of the Convention Concerning Employment of Women during the Night, 1919; Article 1 (2) of the Convention Fixing the Minimum Age for Admission of Children to Industrial Employment, 1919; Article 1 (2) of the Convention Concerning the Night Work of Young Persons Employed in Industry, 1919; Article 1 (1) of the Convention Concerning the Age for Admission of Children to Non-Industrial Employment, 1932; Article 1 (2) of the Convention Concerning Employment of Women during the Night (Revised), 1934; Article 1 (2) of the Convention Fixing the Minimum Age for Admission of Children to Industrial Employment (Revised), 1932; Article 1 (2) of the Convention Concerning the Age for Admission of Children to Non-Industrial Employment (Revised), 1937; Article 1 (3) of the Convention Concerning Medical Examination of Children and Young Persons for Fitness for Employment in Non-Industrial Occupations, 1946; Article 1 (3) of the Convention Concerning the Restriction of Night Work of Children and Young Persons in Non-Industrial Occupations, 1946; Article 1 (3) of the Convention Concerning Medical Examination for Fitness for Employment in Industry of Children and Young Persons, 1946; Article 1 (3) of the Convention Concerning the Restriction of Night Work of Children and Young Persons in Non-Industrial Occupations, 1946; Article 1 (2) of the Convention Concerning Night Work of Women Employed in Industry (Revised), 1948; Article 1 (2) of the Convention Concerning the Night Work of Young Persons Employed in Industry (Revised), 1948.

Convention, 1921, and Articles 3 and 4 of the Weekly Rest (Industry) Convention, 1921. The language employed in Article 4 is particularly broad and provides:

'Each member may authorize total or partial exceptions (including suspensions or diminutions) from the provisions of Article 2, special regard being had to all proper humanitarian and economic considerations and after consultation with responsible associations of employers and workers, wherever such exist.'

Another type of exemption clause frequently included in conventions is one where an Article formulates several categories of persons and specific situations where the national authority is given discretion to grant exemption. An example is Article 2 of the Sickness Insurance (Agriculture) Convention, 1927, which states:

'1. The compulsory sickness insurance system shall apply to manual and non-manual workers, including apprentices, employed by agricultural undertakings.

'2. It shall, nevertheless be open to any member to make such exceptions in its national laws or regulations as it deems necessary in respect of (a) temporary employment which lasts for less than a period to be determined by national laws or regulations, casual employment not for the purpose of the employer's trade or business, occasional employment and subsidiary employment; (b) workers whose wages or income exceed an amount to be determined by national laws or regulations; (c) workers who are not paid a money wage; (d) outworkers whose conditions of work are not of a like nature to those of ordinary wage-earners; (e) workers below or above age-limits to be determined by national laws or regulations; (f) members of the employer's family.

'3. It shall further be open to exempt from the compulsory sickness insurance system persons who in case of sickness are entitled by virtue of any laws or regulations or of a special scheme, to advantages at least equivalent on the whole to those provided for in this Convention.'

In the Old Age Insurance (Industry) Convention, 1933, it is specified that no less than ten different categories of workers may be exempted by the national authority.¹ An example of a 'flexible scope' provision couched in more general terms occurs in the Protection of Wages Convention, 1949, which applies in principle to all persons to whom wages are paid or payable. However, under Article 2 (2) the competent authority may 'after consultation with the organisations of employers and employed persons directly concerned, if such exist, exclude from the application of all or any of the provisions of the Convention categories of persons whose circumstances and conditions of employment are such that the application to them of all or any of the said provisions would be inappropriate and who are

¹ Article 2 (2) of the Convention. See also Article 7 of the Convention Concerning Benefits in the Case of Employment Injury, 1964: 'Each member shall prescribe a definition of "industrial accident", including the conditions under which a commuting accident is considered to be an industrial accident, and shall specify the terms of such definition in its reports upon the application of this Convention submitted under article 22 of the Constitution of the International Labour Organisation.'

not employed in manual labour or are employed in domestic service or work similar thereto'.¹

(c) *Discretion in application.* In four conventions, the scope of the convention even in respect of the occupations or categories of persons to which it is to apply, is left to be determined by each member State. Article 2 of the 1928 Convention Concerning the Creation of Minimum Wage-Fixing Machinery provides:

'Each member which ratifies this Convention shall be free to decide, after consultation with the organisations, if any, of workers and employers in the trade or part of trade concerned, in which trades or parts of trades, and in particular in which home working trades or parts of such trades, the minimum wage-fixing machinery referred to in Article 1 shall be applied.'

A similar provision is to be found in other conventions.² A different formula is used in Article 2 of the Labour Inspection Convention, 1947, which states: 'The system of labour inspection in industrial workplaces shall apply to all workplaces in respect of which legal provisions relating to conditions of work and the protection of workers while engaged in their work are enforceable by labour inspectors.'

Another kind of clause, less far-reaching in its effect, permits a member to vary the application of part of a convention it has ratified. In the most recent convention adopted by the Conference, that Concerning Accommodation on Fishing Vessels, Article 1 (7) permits the provisions of Part III to be varied in the case of any vessel, as long as the variations to be made provide corresponding advantages which are no less favourable than those that would result from the full application of its provisions.³

¹ See also Article 2 of the Convention Concerning Sickness Insurance for Workers in Industry and Commerce and Domestic Servants, 1927; Article 1 (2) of the Convention Concerning the Regulation of Hours of Work in Commerce and Offices, 1930; Article 2 of the Convention Concerning Compulsory Old-Age Insurance for Persons Employed in Agricultural Undertakings, 1933; Article 2 of the Convention Concerning Compulsory Invalidity Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions and for Outworkers and Domestic Servants; Article 2 of the Convention Concerning Compulsory Invalidity Insurance for Persons Employed in Agricultural Undertakings, 1933; Article 2 of the Convention Concerning Compulsory Widows' and Orphans' Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions, and for Outworkers and Domestic Servants, 1933; Article 2 of the Convention Concerning Compulsory Widows' and Orphans' Insurance for Persons Employed in Agricultural Undertakings, 1933; Article 2 of the Convention Ensuring Benefit or Allowances to the Involuntarily Unemployed, 1934; Article 1 of the Convention Concerning Social Security for Seafarers, 1946; Article 2 of the Convention Concerning Seafarers' Pensions, 1946.

² See also Article 3 of the Convention Concerning Night Work in Bakeries, 1925; Article 2 of the Convention Concerning the Creation of Minimum Wage-Fixing Machinery, 1928; Article 3 of the Convention Concerning Fee-Charging Employment Agencies, 1933; Article 1 (3) of the Convention Concerning the Reduction of Hours of Work on Public Works, 1936; Article 5 of the Convention Concerning the Reduction of Hours of Work in the Textile Industry, 1932; Article 44 of the Convention Concerning Conditions of Employment of Plantation Workers, 1958; Article 1 (2) of the Convention Concerning Medical Examination of Fishermen, 1959; Article 2 of the Convention Concerning Hygiene in Commerce and Offices.

³ Article 1 (2) of the Convention Concerning Minimum Wage Fixing Machinery in Agriculture, 1951 and Article 4 of the Convention Concerning Holidays with Pay in Agriculture, 1952.

Sometimes, in the case of doubtful provisions of a convention, the competent national authority will be explicitly empowered to make a final determination of the meaning of an ambiguous provision. Article 2 of the Convention Concerning Seafarers' National Identity Documents, 1958, expressly provides that in case of any doubt concerning categories of persons to be regarded as seafarers for the purpose of the Convention, the question is to be settled by the competent authority in each country after consultation with the shipowners' and seafarers' organizations concerned.

However, not all flexibility devices operate in favour of a contraction of liability. Some conventions prescribe a minimum standard from which a State must not deviate and then permit the State to extend the provisions of the convention to new categories of persons or situations. For example, the Convention Concerning Conditions of Employment of Plantation Workers, 1958, after defining the word 'plantation' in Article 1 (1), then provides in Article 1 (2) that, 'each member for which this Convention is in force may, after consultation with the most representative organizations of employers and workers concerned, where such exist, make the Convention applicable to other plantations by (a) adding to the list of crops referred to in paragraph 1 of this Article any one or more of the following crops: rice, chicory, cardamom, geranium and pyrethrum, or any other crop; (b) adding to the plantations covered by paragraph 1 of this Article classes of undertakings not referred to therein which, by national law or practice, are classified as plantations . . .'.¹

Sometimes the whole of a convention will be worded in such broad and flexible terms as to leave to the competent national authority considerable latitude and discretion concerning interpretation and implementation. Examples are the Convention Concerning Benefits in the Case of Employment Injury, 1964,² and the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957. The latter Convention in particular, in the terms employed to stipulate the categories of persons to whom the Convention applies³ and the methods of implementation,⁴ is a remarkable example of flexible drafting. In other

¹ Article 1 (7) of the Convention Concerning Accommodation on Board Fishing Vessels: 'The provisions of Part III of this Convention may be varied in the case of any vessel if the competent authority is satisfied, after consultation with the fishing-vessel owners' and fishermen's organisations where such exist, that the variations to be made provide corresponding advantages as a result of which the over-all conditions are no less favourable than those that would result from the full application of the provisions of the Convention.' See also Article 1 (5) of the Accommodation of Crews Convention (Revised), 1949.

² Article 1 (2) of the Convention Concerning Conditions of Employment of Plantation Workers, 1958. See also Article 3 of the Convention Concerning Weekly Rest in Commerce and Offices, 1957.

³ See Articles 2, 3, 4, 7, 8 and 15.

⁴ Article 1 of the Convention: 'This Convention applies to (a) members of tribal or semi-tribal

conventions the discretion given to the national authority is more circumscribed and limited to a particular point of interpretation. In the Labour Clauses (Public Contracts) Convention, 1949, the competent authority is empowered to determine the extent and manner in which the Convention is to be applied to contracts awarded by authorities other than central authorities.¹ Again, in the Guarding of Machinery Convention, 1963, the competent authority is authorized to decide when and to what extent machinery operated by manual power presents a risk of injury to the worker and consequently is to be considered as machinery for the purpose of the application of the Convention.²

2. *Methods of Implementation*

Reference has already been made to Article 28 of the Convention for the Protection of Indigenous Populations,³ which provides that the nature and scope of the measures to be taken to give effect to the Convention are to be determined in a flexible manner having regard to the conditions characteristic of each country. Almost equally broad is the language used in the Holidays with Pay Convention, 1957,⁴ which leaves each member free to decide the manner in which provision shall be made for holidays with pay in agriculture, and also the language in the Guarding of Machinery Convention, 1963, which merely states that 'all necessary measures'⁵ shall be taken for the effective enforcement of the Convention.

Since 1927 a number of conventions have included in their first article an 'equivalent provisions' clause, comparable to the one incorporated in the Sickness Insurance (Industry) Convention, 1927, which states: 'Each member of the International Labour Organisation which ratifies this

populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.'

¹ Article 1 (2) of the Convention Concerning Labour Clauses in Public Contracts.

² See Article 1 (2) of the Convention Concerning the Guarding of Machinery 1963.

³ See above, p. 40.

⁴ Article 2 of the Convention Concerning Holidays with Pay in Agriculture: '1. Each member which ratifies this Convention shall be free to decide the manner in which provision shall be made for holidays with pay in agriculture. 2. Such provision may be made, where appropriate, by means of collective agreement or by entrusting the regulation of holidays with pay in agriculture to special bodies.'

⁵ Article 15 of the Convention Concerning the Guarding of Machinery, 1963: 'All necessary measures, including the provision of appropriate penalties, shall be taken to ensure the effective enforcement of the provisions of this Convention.'

Convention undertakes to set up a system of compulsory sickness insurance which shall be based on provisions at least equivalent to those contained in this Convention.¹

Some conventions specify an extensive variety and number of ways of implementing a convention and permit effect to be given to it by means of laws or regulations, collective agreements or a combination of laws or regulations and collective agreements.² An even more comprehensive formula was devised and embodied in the Convention concerning Weekly Rest in Commerce and Offices, 1957. Article 2 of the Convention states that 'the provisions of this Convention shall, in so far as they are not otherwise made effective by means of statutory wage fixing machinery, collective agreements, arbitration awards or in such other manner consistent with national practice as may be appropriate under national conditions, be given effect by national laws or regulations'.³

One may note in particular the use of collective agreements as a flexibility device. A number of conventions⁴ provide that where a member has given effect to a provision of a convention by means of a collective agreement, then it is no longer incumbent on the member to take any further measures to implement that provision. However, the member is obliged to supply the Director-General of the International Labour Office with information on the measures by which the convention is applied, including particulars of any collective agreements which give effect to any of its provisions and

¹ Article 1 of the Convention Concerning Sickness Insurance for Agricultural Workers, 1927; Article 1 of the Convention Concerning Compulsory Old-Age Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions and for Outworkers and Domestic Servants; Article 1 of the Convention concerning Compulsory Invalidity Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions, and for Outworkers and Domestic Servants; Article 1 of the Convention Concerning Compulsory Invalidity Insurance for Persons Employed in Agricultural Undertakings, 1933; Article 1 of the Convention Concerning Compulsory Widows' and Orphans' Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions, and for Outworkers and Domestic Servants; Article 1 of the Convention Concerning Compulsory Widows' and Orphans' Insurance for Persons Employed in Agricultural Undertakings.

² Article 1 of the Convention Concerning Sickness Insurance for Workers in Industry and Commerce and Domestic Servants, 1927.

³ Article 10 of the Convention Concerning Vacation Holidays with Pay for Seafarers, 1946: 'Effect may be given to this Convention by (a) laws or regulations; (b) collective agreements between shipowners and seafarers; or (c) a combination of laws or regulations and collective agreements between shipowners and seafarers.' See also Article 21 of the Convention Concerning Wages, Hours of Work on Board Ship and Manning (Revised), 1949, and Article 22 of the Convention Concerning Wages, Hours of Work on Board Ship and Manning (Revised), 1958: Article 2 (2) of the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951.

⁴ Article 1 of the Convention Concerning Weekly Rest in Commerce and Offices, 1957. A variation of this formula is contained in Article 1 of the Convention Concerning the Protection of Workers against Ionising Radiations, 1960, which states: 'Each member of the International Labour Organisation which ratifies this Convention undertakes to give effect hereto by means of laws or regulations, codes of practice or other appropriate means. In applying the provisions of the Convention the competent authority shall consult with representatives of employers and workers.'

are in force at the date when the member ratifies the convention.¹ The Director-General then lays a summary of this information before a Tripartite Commission² and the Commission considers whether the collective agreements reported to it give full effect to the provisions of the convention.³

A convention may also refer to the possibility of a higher standard being arranged by collective⁴ agreement or leave the classification of persons to whom the convention applies to be determined by collective agreement or prescribe that the standards contained in the convention will be defined in greater detail by means of collective agreements.⁵ Sometimes, as in the Hours of Work Convention, 1919, the existence of a collective agreement may be a condition precedent to the operation of a number of exceptions provided for by the convention.⁶

3. *Ratification by Parts.*

The principal characteristic of this flexibility device is that a State, when ratifying, may either declare which parts of the convention it accepts or may exclude certain parts of the convention from its acceptance. There is usually provision for the subsequent acceptance of the parts originally excluded, together with an obligation to report on progress made towards the acceptance of excluded parts. Acceptance of a minimum number of parts, sometimes including certain specified parts, is also usually required for ratification. One apposite clause is Article 3 of the Convention concerning Conditions of Employment of Plantation Workers, 1958, which states:

'1. Each member for which this Convention is in force (a) shall comply with—(i) Part I, (ii) Parts IV, IX and XI, (iii) at least two of Parts II, III, V, VI, VII, VIII, X, XII, and XIII, and (iv) Part XIV; (b) shall, if it has excluded one or more Parts from its acceptance of the obligations of the Convention, specify, in a declaration appended to its ratification, the part or parts so excluded.

'2. Each member which has made a declaration under paragraph 1 (b) of this Article shall indicate in its annual reports submitted under Article 22 of the Constitution of the

¹ Article 10 (2) of the Convention Concerning Holidays with Pay for Seafarers, 1946: 'Where effect has been given to any provision of this Convention by a collective agreement in pursuance of paragraph 1 of this Article, notwithstanding anything contained in Article 8 of this Convention, the member in whose territory the agreement is in force shall not be required to take any measures in pursuance of Article 8 in respect of the provisions of the Convention to which effect has been given by collective agreement.' See also Article 21 of the Convention Concerning Wages, Hours of Work on Board Ship and Manning, 1946, and Article 10 of the Convention Concerning Social Security for Seafarers, 1946.

² Article 10 (3) of the Convention Concerning Vacation Holidays with Pay for Seafarers, 1946.

³ *Ibid.*, Article 10 (4).

⁴ *Ibid.*, Article 10 (2).

⁵ Article 3 (b) of the Convention Concerning Annual Holidays with Pay for Seamen, 1936.

⁶ Article 2 (b) of the Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week, 1919.

International Labour Organisation any progress made towards the application of the excluded Part or Parts.

'3. Each member which has ratified the Convention but has excluded any Part or Parts thereof under the provisions of the preceding paragraphs, may subsequently notify the Director-General of the International Labour Office that it accepts the obligations of the Convention in respect of any Part or Parts so excluded; such undertaking shall be deemed to be an integral part of the ratification and to have the force of ratification as from the date of notification.'

An example of a State's being permitted to ratify a convention and exclude certain parts, may be found in the prototype of the ratification by parts device in Article 2 of the Convention Concerning Statistics of Wages and Hours of Work, 1938.¹ This article permits any member which ratifies the Convention to exclude from its acceptance: (a) any one of Parts II, III, or IV; or (b) Parts II and IV; or (c) Parts III and IV.

A comparable device was later included in the Labour Inspection Convention, 1947,² the Fee-Charging Employment Agencies Convention (Revised), 1949,³ the Migration for Employment Convention (Revised) 1949,⁴ the Minimum Standards of Social Security Convention, 1952⁵ and the Wages and Hours of Work Convention, 1958.⁶ The Convention Concerning Minimum Standards of Social Security, 1952, is remarkable for the extent to which it goes in favour of flexibility rather than uniformity of application. Article 2 stipulates: 'Each member for which this Convention is in force (a) shall comply with—(i) Part I; (ii) at least three of Parts II, III, IV, V, VI, VII, VIII, IX and X, including at least one of Parts IV, V, VI, IX and X; (iii) the relevant provisions of Parts XI, XII and XIII; and (iv) Part XIV; and (b) shall specify in its ratification in respect of which of Parts II to X it accepts the obligations of the Convention.'

In the Labour Inspection Convention, 1947, a State ratifying the Convention is allowed to exclude Part II which relates to commerce but cannot exclude Part I which refers to industry.⁷ The Fee-Charging Employment

¹ Article 2 of the Convention Concerning Statistics of Wages and Hours of Work in the Principal Mining and Manufacturing Industries, including Building and Construction, and in Agriculture, 1938.

² Article 25 of the Convention Concerning Labour Inspection in Industry and Commerce, 1947: '1. Any member of the International Labour Organisation which ratifies this Convention may, by a declaration appended to its ratification, exclude Part II from the acceptance of the Convention.'

³ Article 2 of the Convention Concerning Fee-Charging Employment Agencies (Revised), 1949: '1. Each member ratifying this Convention shall indicate in its instrument of ratification whether it accepts the provisions of Part II of the Convention, providing for the progressive abolition of fee-charging employment agencies conducted with a view to profit and the regulation of other agencies, or the provisions of Part III, providing for the regulation of fee-charging employment agencies including agencies conducted with a view to profit.'

⁴ Article 14 of the Convention Concerning Migration for Employment (Revised), 1949.

⁵ Articles 2 and 3 of the Convention Concerning Minimum Standards of Social Security, 1952.

⁶ Article 5 of the Convention Concerning Wages, Hours of Work on Board Ship and Manning (Revised), 1958.

⁷ Article 25 of the Convention Concerning Labour Inspection in Industry and Commerce,

Agencies Convention (Revised), 1949, consists of two alternative parts and each member ratifying the Convention is to indicate whether it accepts the provisions of Part II of the Convention providing for the progressive abolition of fee-charging employment agencies conducted with a view to profit and the regulation of other agencies, or the provisions of Part III, providing for the regulation of fee-charging employment agencies including agencies conducted with a view to profit. Under Article 2 (2) a member accepting Part III may subsequently notify the Director-General that it accepts the provisions of Part II and at that point the provisions of Part III cease to be applicable.¹ The Migration for Employment Convention (Revised), 1949, permits a member ratifying the Convention to exclude from the ratification any or all of its Annexes. It also provides that in a case where a member excludes an Annex, the member will accept the excluded Annex as having the force of a recommendation.² A similar provision is included in Article 5 (5) of the Convention Concerning Wages, Hours of Work on Board Ship and Manning (Revised), 1958, in respect of Part II of the Convention which deals with wages and which may be excluded by means of a declaration under Article 5 (1).³

4. *Specific Countries*

Reference has already been made⁴ to Article 19 (3) of the Constitution which permits flexibility clauses for specified countries to be included in a convention. During the early years of the Organization a large number of conventions containing such clauses were adopted by the International Labour Conference. The Hours of Work (Industry) Convention, 1919, in Articles 9 and 10 makes allowance for modification of the provisions of the Convention in their application to Japan and India.⁵ Article 11 exempts China, Persia and Siam from the provisions of the Convention and provides for a future meeting of the Conference to consider imposing limits on the

1947: 'Any member of the International Labour Organisation which ratifies this Convention may, by a declaration appended to its ratification, exclude Part II from its acceptance of the Convention.'

¹ However, it is not possible to switch from Part II to Part III. See Article 2 (2) of the Convention Concerning Fee-Charging Employment Agencies, 1949: 'Any member accepting the provisions of Part III of the Convention may subsequently notify the Director-General that it accepts the provisions of Part II; as from the date of the registration of such notification by the Director-General, the provisions of Part III of the Convention shall cease to be applicable to the member in question and the provisions of Part II shall apply to it.'

² Article 14 (1) and 14 (4) of the Convention Concerning Migration for Employment (Revised), 1949.

³ Article 5 (1) of the Convention Concerning Wages, Hours of Work on Board Ship and Manning (Revised), 1958: 'Each member ratifying this Convention may, by a declaration appended to its ratification, exclude from its ratification Part II of the Convention.'

⁴ See above, pp. 31 et seq.

⁵ Articles 9 and 10 of the Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week, 1919.

hours of work in these countries.¹ In the case of Greece and Roumania the date at which the provisions of the Convention were to be brought into operation was extended until July 1923 for certain industrial undertakings in Greece² and until July 1924 in Roumania.³ Three other conventions adopted in 1919 contain similar provisions. Article 5 of the Convention Concerning Night Work (Women) provides that Article 3 of the Convention may be suspended in India and Siam in respect of any industrial undertaking, except factories as defined by the national law.⁴ The Minimum Age (Industry) Convention, 1919, provides for modifications in the application of the provisions of Article 2 to Japan and India.⁵ Special provision is also made for the same two countries in the Night Work of Young Persons (Industry) Convention, 1919.⁶

When the Convention Concerning Night Work of Women was revised in 1924, the special provision for India and Siam was retained.⁷ In a later revision of the Convention in 1948, new provisions were introduced concerning India and Pakistan.⁸ During the revision of the Convention Concerning Minimum Age (Industry), 1937, more detailed modifications were included in the case of India and Japan and new provisions were introduced to deal with the case of China.⁹ More elaborate modifications were also included in the revision of the Night Work of Young Persons (Industry) Convention, 1948, and special provisions made for Pakistan and India.¹⁰

Apart from these early conventions and their revised versions, the flexibility clause regarding specific countries has been included in three further conventions. The Night Work of Young Persons (Non-Industrial Employment) Convention, 1932,¹¹ the Minimum Age (Non-Industrial

¹ Ibid., Article 11.

² Ibid., Article 12.

³ Ibid., Article 13: 'In the application of this Convention to Rumania the date at which its provisions shall be brought into operation in accordance with Article 19 may be extended to not later than 1 July 1924.'

⁴ Article 5 of the Convention Concerning Employment of Women during the Night, 1919.

⁵ Articles 5 and 6 of the Convention Fixing the Minimum Age for Admission of School-children to Industrial Employment, 1919.

⁶ Article 5 of the Convention Concerning the Night Work of Young Persons Employed in Industry, 1919: 'In the application of this Convention to Japan, until 1 July 1925, Article 2 shall apply only to young persons under fifteen years of age and thereafter it shall apply only to young persons under sixteen years of age'; and Article 6: 'In the application of this Convention to India, the term "industrial undertaking" shall include only "factories" as defined in the Indian Factory Act, and Article 2 shall not apply to male young persons over fourteen years of age.'

⁷ Article 5 of the Convention Concerning Employment of Women during the Night (Revised), 1934.

⁸ Articles 10 and 11 of the Convention Concerning the Night Work of Women Employed in Industry (Revised), 1948.

⁹ Articles 6, 7 and 8 and the Convention Fixing the Minimum Age for Admission of Children to Industrial Employment (Revised), 1937.

¹⁰ Articles 8 and 9 of the Convention Concerning the Night Work of Young Persons Employed in Industry (Revised), 1948.

¹¹ Article 9 of the Convention Concerning the Age for Admission of Children to non-Industrial Employment, 1932.

Employment) Convention (Revised), 1937¹ and the Night Work of Young Persons (non-Industrial Occupations) Convention, 1946,² each contains a clause relating to India. So far India has ratified none of these Conventions. However, of the other nine conventions where special provision has been made for India, she has failed to ratify only one.³

5. *Special Circumstances*

The interpretation of Article 19 (3) of the Constitution to cover a situation where a country is not specified by name but where special conditions prevail in the country which fall within the meaning of Article 19 (3) has already been mentioned.⁴ A recent illustration occurs in Article 2 of the Convention Concerning Benefits in the Case of Employment Injury, 1964, which provides: 'A Member whose economic and medical facilities are insufficiently developed may avail itself by a declaration accompanying its ratification of the temporary exceptions provided for in the following Articles: Article 5, article 9, paragraph 3, clause (b), article 12, article 15, paragraph 2, and article 18, paragraph 3. Any such declaration shall state the reason for such exceptions.'⁵ More examples may be given from the early Conventions adopted by the Labour Conference. Several contain a clause similar to the one in the Night Work (Women) Convention, 1919, referring to countries where the climate renders work by day particularly trying to the health.⁶ A different clause was incorporated in the Night Work of Young Persons (Industry) Convention, 1919, making special provision for tropical countries where work is suspended during the middle of the day.⁷ However, it would seem that recourse to this type of flexibility device is not very frequent, being limited to the eight conventions already mentioned.

6. *New Legislation*

In a case where a State has no previous legislation regulating the subject-matter of a convention, it will sometimes be permitted to ratify on the basis of a standard different from, and lower than, the one contained in the

¹ Article 9 of the Convention Concerning the Age for Admission of Children to Non-Industrial Employment (Revised), 1937.

² Article 8 of the Convention Concerning the Restriction of Night Work of Children and Young Persons in Non-Industrial Occupations, 1946.

³ That one is the Convention Fixing the Minimum Age for Admission of Children to Industrial Employment (Revised), 1937.

⁴ See above, p. 32.

⁵ Article 2 of the Convention Concerning Benefits in the Case of Employment Injury, 1964.

See also Article 3 of the Convention Concerning Minimum Standards of Social Security, 1952.

⁶ Article 7 of the Convention Concerning Employment of Women during the Night, 1919. Article 7 of the Convention Concerning Employment of Women during the Night (Revised), 1934. Article 4 (1) of the Convention Concerning the Restriction of Night Work of Children and Young Persons in Non-Industrial Occupations, 1946; Article 7 of the Convention Concerning the Night Work of Women Employed in Industry (Revised), 1948; Article 4 (1) of the Convention Concerning the Night Work of Young Persons Employed in Industry (Revised), 1948.

⁷ Article 3 (4) of the Convention Concerning the Night Work of Young Persons Employed in Industry, 1919.

convention. This flexibility device was one of the earliest to be incorporated in a convention and was first used in Article 2 (2) of the Night Work (Women) Convention, 1919, which provides: In those countries where no Government regulation as yet applies to the employment of women in industrial undertakings during the night, the term 'night' may provisionally, and for a maximum period of three years, be declared by the Government to signify a period of only ten hours, including the interval between ten o'clock in the evening and five o'clock in the morning.¹

A variation of this formula was used in 1925 in the Convention Concerning Compensation for Accidents. Members who ratified the Convention and who did not already possess a system of workmen's compensation, undertook to institute such a system within a period of three years from the date of their ratification.² In 1933 no less than six conventions were adopted by the Labour Conference containing a provision facilitating ratification of the convention by a State which possessed no previous legislation concerning its subject-matter. Article 15 of the Old-Age Insurance (Industry) Convention, 1933, provided:

'In countries which, at the time when this Convention first comes into force, have no laws or regulations providing for compulsory old-age insurance, an existing non-contributory pension scheme which guarantees an individual right to a pension under the conditions defined in Articles 16 to 22 hereinafter shall be deemed to satisfy the requirements of this Convention.'³

A similar clause is contained in the Old-Age Insurance (Agriculture) Convention, 1933,⁴ the Invalidity Insurance (Industry) Convention, 1933,⁵ the Invalidity Insurance (Agriculture) Convention, 1933,⁶ the Survivors' Insurance (Industry) Convention, 1933⁷ and the Survivors' Insurance (Agriculture) Convention, 1933.⁸ The provisions contained in these

¹ Article 2 (2) of the Convention Concerning Employment of Women during the Night 1919; see also Article 2 (3) of the Convention Concerning Employment of Women during the Night (Revised), 1934, and Article 9 of the Convention Concerning the Night Work of Women Employed in Industry (Revised), 1948.

² Article 3 of the Convention Concerning Equality of Treatment for National and Foreign Workers as regards Workmen's Compensation for Accidents, 1925.

³ Article 15 of the Convention Concerning Compulsory Old Age Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions, and for Outworkers and Domestic Servants, 1933.

⁴ Article 15 of the Convention Concerning Compulsory Old-Age Insurance for Persons Employed in Agricultural Undertakings, 1933.

⁵ Article 16 of the Convention Concerning Compulsory Invalidity Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions, and for Outworkers and Domestic Servants, 1933.

⁶ Article 16 of the Convention Concerning Compulsory Invalidity Insurance for Persons Employed in Agricultural Undertakings, 1933.

⁷ Article 18 of the Convention Concerning Compulsory Widows' and Orphans' Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions and for Outworkers and Domestic Servants.

⁸ Article 18 of the Convention Concerning Compulsory Widows' and Orphans' Insurance for Persons Employed in Agricultural Undertakings, 1933.

Conventions may be distinguished from the clause in the Night Work (Women) Convention, 1919, on the ground that they do not provide for the progressive application of the convention on the basis of new legislation but provide for the acceptance of existing legislation which satisfies certain requirements as fulfilling the obligations of the convention, instead of compliance with the normal provisions. However, it may be noted that no ratifications on the basis of these provisions have been received by the Labour Office.

Another version of the device was used in the Medical Examination of Young Persons (Industry) Convention, 1946,¹ and the Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946.² Both these Conventions permit countries having no previous legislation to substitute an age lower than eighteen years, but in no case lower than sixteen years, for the purposes of medical examination for general employment, and an age lower than twenty-one years but not lower than nineteen years for medical examination for occupations involving high health risks. The substitution may be effected by means of a declaration accompanying the ratification and it is pertinent to note that, unlike the Night Work (Women) Convention, 1919, there is no time limit for the withdrawal of the declaration but merely an obligation to report each year on the extent to which any progress has been made towards the full implementation of the Convention. So far no State has invoked the provision. A similar provision is contained in Article 7 of the Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946, permitting the substitution of an age limit lower than eighteen years, but in no case lower than sixteen years.³

An interesting variation of the device was included in the Night Work of Young Persons (Industry) Convention (Revised), 1948. In this Convention flexibility works in favour of a State already possessing legislation regulating the age limit for night work of young persons in industry. If such legislation provides for an age limit lower than eighteen years, then a member, by means of a declaration accompanying its ratification, may substitute an age limit lower than eighteen years but in no case lower than sixteen years.⁴ So far only Mexico has invoked this provision.

7. *Combination of Convention and Recommendation*

The most frequent and important flexibility device is the simultaneous

¹ Article 9 of the Convention Concerning Medical Examination for Fitness for Employment in Industry of Children and Young Persons, 1946.

² Article 9 of the Convention Concerning Medical Examination of Children and Young Persons for Fitness for Employment in Non-Industrial Occupations, 1946.

³ Article 7 of the Convention Concerning the Restriction of Night Work of Children and Young Persons in Non-Industrial Occupations, 1946.

⁴ Article 7 of the Convention Concerning the Night Work of Young Persons Employed in Industry (Revised), 1948.

adoption of a convention and a recommendation. In this way the convention is not encumbered with unnecessary detail and technicalities which might only serve to impede rather than to stimulate and encourage ratification. This practice stretches back to the beginnings of the Organization and the adoption of the Unemployment Recommendation in 1919.¹ A convention on the subject was adopted at the same time² and dealt with statistics concerning unemployment, the establishment of free public employment agencies and reciprocity in unemployment insurance. The scope of the Recommendation was rather different and concerned measures to prohibit the establishment of employment agencies which charged fees or carried on business for profit and the regulation of the recruitment of workers in one country with a view to their employment in another country. Since 1919 this practice of adopting a convention and a complementary recommendation has become increasingly frequent and common.³

However, the practice, although now both well established and general, is by no means invariable or inevitable. Apart from the Unemployment Recommendation, the 1919 Conference adopted five other Recommendations concerning Anthrax Prevention,⁴ Lead Poisoning,⁵ Labour Inspection,⁶ White Phosphorus⁷ and Reciprocity of Treatment.⁸ These Recommendations were in no way related to or dependent on a convention and serve to illustrate that the role of a recommendation is not restricted to being complementary to a convention. The views of the Delegation on Constitutional Questions, 1946, concerning the utility of 'experimental recommendations' have already been mentioned.⁹ It may also be desirable, under certain circumstances,¹⁰ for a recommendation to repeat the substance of a convention and so act as an alternative to rather than as a complement

¹ The Recommendation Concerning Unemployment, 1919.

² Convention Concerning Unemployment, 1919.

³ See, for example, the instrument adopted by the International Labour Conference in 1964 and 1965. Convention Concerning Hygiene in Commerce and Offices, 1964; Recommendation Concerning Hygiene in Commerce and Offices, 1964; Convention Concerning Benefits in the Case of Employment Injury, 1964; Recommendation Concerning Benefits in the Case of Employment Injury, 1964; Convention Concerning Employment Injury, 1964; Recommendation Concerning Employment Policy, 1964; Recommendation Concerning the Employment of Women with Family Responsibilities, 1965; Convention Concerning the Minimum Age for Admission to Employment Underground in Mines, 1965; Recommendation Concerning the Minimum Age for Admission to Employment Underground in Mines, 1965; Convention Concerning Medical Examination of Young Persons for Fitness for Employment Underground in Mines, 1965; Recommendation Concerning Conditions of Employment of Young Persons Underground in Mines, 1965.

⁴ Anthrax Prevention Recommendation, 1919.

⁵ Lead Poisoning (Women and Children) Recommendation, 1919.

⁶ Labour Inspection (Health Services) Recommendation, 1919.

⁷ White Phosphorus Recommendation, 1919.

⁸ Reciprocity of Treatment Recommendation, 1919.

⁹ See above, p. 23.

¹⁰ Where, for example, there is a deep division in the Conference on the merits of adopting a convention or recommendation.

to a convention.¹ A recommendation will also be more suitable when it is a question of a standard to be pursued and where the subject-matter is of particular importance to a limited number of States. An example of this type of instrument is the Recommendation Concerning the Role of Co-operatives in the Economic and Social Development of Developing Countries, adopted by the 1966 Conference.

In those cases where a recommendation does play a complementary role, it is unusual to find the provisions of the recommendation explicitly referred to in the convention. An exception occurs in the case of the Safety Provisions (Building) Convention, 1937, Article 1 of which provides:

'Each member of the International Labour Organisation which ratifies this Convention undertakes that it will maintain in force laws or regulations . . . (b) in virtue of which an appropriate authority has power to make regulations for the purpose of giving such effect as may be possible and desirable under national conditions to the provisions of, or provisions equivalent to the provisions of, the model code annexed to the Safety Provisions (Building) Recommendation 1937, or any revised model code subsequently recommended by the International Labour Conference. 2. Each such member further undertakes that it will communicate every third year to the International Labour Office a report indicating the extent to which effect has been given to the provisions of the model code annexed to the Safety Provisions (Building) Recommendation 1937, or of any revised model code subsequently recommended by the International Labour Conference.'²

However, it is not unusual to find that the provisions of a recommendation refer to the convention to which it is complementary.³

Potentially the recommendation is an instrument of great flexibility. It may be employed for subjects not suitable for a convention in that they are too technical or are changing too rapidly. It may be used to set a standard or as an experiment or as an alternative to a convention. Finally, as a special flexibility device, supplementing and complementing a convention, it may relieve the convention of unnecessary and burdensome detail and so facilitate ratification.⁴

¹ Convention Concerning Wages, Hours of Work on Board Ship and Manning (Revised), 1958, and Recommendation Concerning Wages, Hours of Work on Board Ship and Manning, 1958. See also Convention Concerning Discrimination in Respect of Employment and Occupation, 1958, and Recommendation Concerning Discrimination in Respect of Employment and Occupation, 1958.

² Article 1 of the Convention Concerning Safety Provisions in the Building Industry, 1937. See also Article 4 (b) of the Convention Concerning Hygiene in Commerce and Offices, 1964.

³ Recommendation Concerning the Application of Minimum Wage-Fixing Machinery 1928: 'A. The General Conference of the International Labour Organisation, having adopted a Convention concerning the creation of minimum wage-fixing machinery, and desiring to supplement this Convention by putting on record for the guidance of the members certain general principles which, as present practice and experience show, produce the most satisfactory results, recommends that each member should take the following principles and rules into consideration.' See also Recommendation Concerning Benefits in the Case of Employment Injury, 1964: 'Having determined that these proposals shall take the form of a Recommendation supplementing the Employment Injury Benefits Convention 1964.'

⁴ See, for example, the Recommendation Concerning Hygiene in Commerce and Offices, 1964.

8. *Geographical Coverage*

Disparity in economic conditions may exist not only between one country and another but also within a single country between its industrial and developed areas and its less developed areas. A flexibility clause was therefore devised to deal with the latter situation. It first appeared in the Sickness Insurance (Industry) Convention, 1927, which provided: 'It shall be open to States which comprise large and very thinly populated areas not to apply the Convention in districts where, by reason of the small density and wide dispersion of the population and the inadequacy of the means of communication, the organization of sickness insurance, in accordance with this Convention, is impossible'.¹ States which intended to take advantage of this exception were to give notice of their intention when communicating their formal ratification to the Director-General. They were also to inform the International Labour Office to what districts the exception was to apply and to give reasons for the exemption. In Europe it was only open to Finland to avail itself of the exception contained in the Articles.²

There was no further recourse to this clause until 1937 when it appeared in a slightly different form in the Safety Provisions (Building) Convention, Article 5 of which stated: 'In the case of a member the territory of which includes large areas where, by reason of the sparseness of the population or the stage of economic development of the area, the competent authority considers it impracticable to enforce the provisions of this Convention, the authority may exempt such areas from the application of the Convention either generally or with such exceptions in respect of particular localities or particular kinds of building operations as it thinks fit.'³ In their first annual report on the application of the convention submitted under Article 22 of the Constitution members were to indicate any areas in respect of which they proposed to invoke the exemption clause. After that date, members could invoke the provisions of Article 5 only concerning those areas already indicated in the first report,⁴ and in subsequent annual reports a member might renounce the exemption it had previously invoked for a particular area.⁵ A similar clause appeared in Article 23 of the Convention concerning Statistics of Wages and Hours of Work, 1938;⁶ and later, under the new Constitution, in the Medical Examination of Young Persons

¹ See Article 10 of the Convention Concerning Sickness Insurance for Workers in Industry and Commerce and Domestic Servants, 1927. See also Article 9 of the Convention Concerning Sickness Insurance for Agricultural Workers, 1927.

² *Ibid.*, Article 10 (3).

³ Article 5 of the Convention Concerning Safety Provisions in the Building Industry, 1937.

⁴ *Ibid.*, Article 5 (2).

⁵ *Ibid.*, Article 5 (3).

⁶ Article 23 of the Convention Concerning Statistics of Wages and Hours of Work in the Principal Mining and Manufacturing Industries, including Building and Construction, and in Agriculture, 1938.

(Industry) Convention, 1946,¹ the Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946,² the Labour Inspection Convention, 1947,³ the Employment Service Convention, 1948,⁴ the Labour Clauses (Public Contracts) Convention, 1949,⁵ the Protection of Wages Convention, 1949⁶ and the Fee-Charging Employment Agencies Convention (Revised), 1949.⁷

The clause found in all these conventions is identical with the one employed in the Safety Provisions (Building) Convention, 1937, except for the addition of one paragraph in the Labour Clauses (Public Contracts) Convention, 1949,⁸ and the Protection of Wages Convention, 1949.⁹ This paragraph provides that each member which invokes the provisions of the Article undertakes, at intervals not exceeding three years, to reconsider in consultation with the organizations of employers and workers concerned, where such exist, the practicability of extending the application of the convention to areas exempted in virtue of paragraph 1. A flexibility clause of this type has not been included in any convention since 1949,¹⁰ a reflection perhaps of the fact that its practical effect in assisting ratification of conventions has been negligible.¹¹

9. *Federal States*

Reference has already been made to the provisions for federal States, contained in Article 19 (7) of the Constitution with respect to conventions and recommendations.¹² Apart from those general provisions, four conventions contain modifications or flexibility devices in the case of a federal State. Two simply limit the operation of the convention to matters affecting the central government. Thus, the Reduction of Hours of Work (Public Works) Convention, 1936, 'applies to persons directly employed on building or civil engineering works financed or subsidized by central

¹ Article 8 of the Convention Concerning Medical Examination for Fitness for Employment in Industry of Children and Young Persons, 1946.

² Article 8 of the Convention Concerning Medical Examination of Children and Young Persons for Fitness for Employment in Non-Industrial Occupations, 1946.

³ Article 29 of the Convention Concerning Labour Inspection in Industry and Commerce, 1947.

⁴ Article 12 of the Convention Concerning the Organization of the Employment Service, 1948.

⁵ Article 7 of the Convention Concerning Labour Clauses in Public Contracts, 1949.

⁶ Article 17 of the Convention Concerning the Protection of Wages, 1949.

⁷ Article 15 of the Convention Concerning Fee-Charging Employment Agencies (Revised), 1949.

⁸ Article 7 (3) of the Convention Concerning Labour Clauses in Public Contracts, 1949.

⁹ Article 17 (3) of the Convention Concerning the Protection of Wages, 1949.

¹⁰ The Labour Conference deleted the clause from the Minimum Wage-Fixing Machinery (Agriculture) Convention, 1951.

¹¹ Eleven conventions contain this type of flexibility device. Concerning seven of the conventions, no State has invoked the clause; four States have invoked the clause in respect of the remaining four conventions.

¹² See above, pp. 4-15.

Governments'.¹ The Labour Clauses (Public Contracts) Convention, 1949, applies to contracts, 'awarded by a central authority of a Member of the International Labour Organization for which the Convention is in force'.²

A more detailed clause was included in Article 6 (2) of the Migration for Employment Convention (Revised), 1949.³ The first part of the Article obliges members who have ratified the Convention to apply without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of certain matters. The second part of Article 6 stipulates that in the case of a federal State the provisions of the Article are only to apply in so far as the matters dealt with are regulated by federal law or regulations or are subject to the control of federal administrative authorities. The extent to which and manner in which the provisions are to be applied concerning matters regulated by the law of the constituent States is to be determined by each member. The member is to indicate in its annual report on the application of the convention the extent to which the matters dealt with in the Article are regulated by federal laws. In respect of matters regulated by the law of the constituent States the member is to take the steps provided for in paragraph 7 (b) of Article 19 of the Constitution. Even so, this special provision in the case of federal States does not appear to have been successful in facilitating ratification by them.⁴

Finally there is a provision in the Labour Inspection Convention, 1947, that so far as is compatible with administrative practice, labour inspection shall be placed under the supervision and control of a central authority and in the case of a federal State the term 'central authority' may mean either a federal authority or a central authority of a federated unit.⁵

10. *Emergency Clauses*

A number of conventions allow for the suspension of all or some of the provisions of a convention in case of national emergency. Article 14 of the Hours of Work (Industry) Convention, 1919, for example, specifies: 'The operation of the provisions of this Convention may be suspended in any country by the Government in the event of war or other emergency endangering the national safety.'⁶ Again, in some other conventions

¹ Article 1 (1) of the Convention Concerning the Reduction of Hours of Work on Public Works, 1936.

² Article 1 (d) of the Convention Concerning Labour Clauses in Public Contracts, 1949.

³ Article 6 (2) of the Convention Concerning Migration for Employment (Revised), 1949.

⁴ Of the nineteen States that have ratified the Convention, only one is a federal State.

⁵ Article 4 of the Convention Concerning Labour Inspection in Industry and Commerce, 1947.

⁶ See Article 14 of the Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week. See also Articles 4 and 7 of the Convention Concerning the Night Work of Young Persons Employed in Industry, 1919.

provision is made for cases of *force majeure*. Thus, Article 4 of the Night Work (Women) Convention, 1919, stipulates:

'Article 3 shall not apply (a) in cases of force majeure, when in any undertaking there occurs an interruption of work which it was impossible to foresee, and which is not of a recurring character; (b) in cases where the work has to do with raw materials or materials in course of treatment which are subject to rapid deterioration, when such night work is necessary to preserve the said materials from certain loss.'¹

Further instances may be given of suspension of the provisions of a convention in cases of emergency² or *force majeure*³ and occasionally⁴ a convention will provide against both contingencies.

11. *Specified Percentage of Compliance*

Two conventions contain provisions enabling States to discharge the obligations assumed by them as long as the State ensures a specified percentage of compliance with the provisions of the convention. This flexibility device appears in the Social Security (Minimum Standard) Convention, 1952, and the Convention Concerning Benefits in the Case of Employment Injury, 1964, Article 5 of which provides:

'... where a declaration provided for in Article 2 is in force, the application of national legislation concerning employment injury benefits may be limited to prescribed categories of employees, which shall total in number not less than 75 per cent of all employees in industrial undertakings, and, in respect of the death of the breadwinner, prescribed categories of beneficiaries.'⁵

Article 5 of the Minimum Standards Social Security Convention, 1952, similarly provides that, 'where, for the purpose of compliance with any of the Parts II to X of this Convention which are to be covered by its ratification, a member is required to protect prescribed classes of persons constituting not less than a specified percentage of employees or residents, the member shall satisfy itself, before undertaking to comply with any such Part, that the relevant percentage is attained'.⁶ It is still too early to assess

¹ Article 4 of the Convention Concerning Employment of Women during the Night, 1919.

² Article 5 of the Convention Concerning the Night Work of Young Persons Employed in Industry (Revised), 1948.

³ Article 4 of the Convention Concerning Night Work in Bakeries, 1925; Article 5 of the Convention Concerning the Regulation of Hours of Work in Commerce and Offices, 1930; Article 3 of the Convention for the Regulation of Hours of Work in Automatic Sheet-Glass Works, 1934; Article 3 of the Convention Concerning the Minimum Requirement of Professional Capacity for Masters and Officers on Board Merchant Ships, 1936.

⁴ Articles 8 and 16 of the Convention Limiting Hours of Work in Coal Mines, 1931, and Articles 6 and 11 of the Convention Concerning the Reduction of Hours of Work in the Textile Industry, 1937.

⁵ Article 5 of the Convention Concerning Benefits in the Case of Employment Injury, 1964; see also Article 4 (2): 'Any member may make such exceptions as it deems necessary in respect of (d) other categories of employees, which shall not exceed in number 10 per cent of all employees other than those excluded under clauses (a) to (c).'

⁶ Article 5 of the Convention Concerning Minimum Standards of Social Security, 1952. For the specified percentage of compliance see Articles 9, 15, 21, 27, 33, 41, 48, 55 and 61.

the value of Article 5 of the Employment Injury Convention in encouraging ratification, but undue optimism is precluded by the fact that the Social Security (Minimum Standards) Convention, 1952, has so far been ratified by only fifteen States.

12. *Transitory Provisions*

A few conventions provide for temporary exceptions in respect of the full application of certain of their provisions. A recent example is Article 13 of the Fishermen's Certificates of Competency Convention, 1966:¹

'During a period of three years from the date of the coming into force of national laws or regulations giving effect to the provision of this Convention, competency certificates may be issued to persons who have not passed an examination referred to in Articles 11 and 12 of this Convention, but who have in fact had sufficient practical experience of the duties corresponding to the certificate in question and have no record of any serious technical error against them.'

Other examples are: Article 5 of the Guarding of Machinery Convention, 1963;² Article 2 of the Employment Injury Convention, 1964;³ Article 4 (3) of the Officers' Competency Certificates Convention, 1936;⁴ Article 5 of the Certification of Ships' Cooks Convention, 1946;⁵ Article 3 (2) of the Medical Examination of Seafarers Convention, 1946;⁶ and Article 3 of the Certification of Able Seamen Convention, 1946.⁷

Three conventions, the Contracts of Employment (Indigenous Workers) Conventions, 1939⁸ and 1947,⁹ and the Labour Clauses (Public Contracts) Convention, 1949,¹⁰ stipulate that they do not apply to contracts entered into before the coming into force of the Convention. Two others, the Social Security (Minimum Standards) Convention, 1952¹¹ and the Accommodation

¹ Article 13 of the Convention Concerning Fishermen's Certificates of Competency, 1966.

² Article 5 of the Convention Concerning the Guarding of Machinery, 1963. In this case there is an additional condition that 'the competent authority shall consult the most representative organizations of employers and workers concerned and, as appropriate, manufacturers' organizations'.

³ Article 2 of the Convention Concerning Benefits in the Case of Employment Injury, 1964; no time limit is specified but a Member availing itself, by means of a declaration, of the temporary exceptions, must include in its Report a statement in respect of each exception stipulating that the reason for the exception still subsists or that it renounces its right to avail itself of the exception in question as from a stated date.

⁴ Article 4 (3) of the Convention Concerning the Minimum Requirement of Professional Capacity for Masters and Officers on Board Merchant Ships, 1936.

⁵ Article 5 of the Convention Concerning the Certification of Ships' Cooks, 1946.

⁶ Article 3 (2) of the Convention Concerning the Medical Examination of Seafarers, 1946; in this case the transitional period is limited to two years.

⁷ Article 3 of the Convention Concerning the Certification of Able Seamen, 1946.

⁸ Article 20 of the Convention Concerning the Regulation of Written Contracts of Employment of Indigenous Workers, 1939.

⁹ Article 5 of the Convention Concerning the Maximum Length of Contracts of Employment of Indigenous Workers, 1947.

¹⁰ Article 9 of the Convention Concerning Labour Clauses in Public Contracts, 1949.

¹¹ Article 73 of the Convention Concerning Minimum Standards of Social Security, 1952: 'This Convention shall not apply to (a) contingencies which occurred before the coming into force of

of Crews Convention (Revised), 1949,¹ preclude their application to situations which arose before their entry into force. So too does Article 17 of the Accommodation on Board Fishing Vessels Convention, 1966, which states that the Convention applies to vessels the keels of which are laid down subsequently to the coming into force of the Convention for the territory of registration. In the case of a vessel which was fully complete on the date of coming into force of the Convention and which is below the standard of the Convention, the competent authority may require alterations to bring the vessel into conformity with the provisions of the Convention when the vessel is re-registered or substantial structural alterations are made.² A comparable provision is contained in Article 3 of the Protection of Workers against Ionising Radiations Convention, 1960, which provides that 'the member concerned shall modify, as soon as practicable, measures adopted by it prior to the ratification of the Convention, so as to comply with the provisions thereof, and shall promote such modification of other measures existing at the time of ratification'.³ The member is also obliged, at the time of ratification, to indicate the manner in which and the categories of workers to which the provisions of the Convention are applied and to indicate in its reports on the application of the Convention any further progress made in the matter.⁴

13. *Drafting Procedure*

The relevance of the machinery for drafting international labour conventions to the question of flexibility needs no stressing. If the machinery is effective in enlisting the co-operation of members and ensuring a full disclosure of information and views between them and the Labour Office, then conventions are more likely to be drafted in such a manner as to reflect the realities of the situation and take account of extraordinary conditions which may exist in some States concerning the subject-matter

the relevant Part of the Convention for the member concerned; (b) benefits in contingencies occurring after the coming into force of the relevant Part of the Convention for the member concerned in so far as the rights to such benefits are derived from periods preceding that date.'

¹ Article 18 of the Convention Concerning Crew Accommodation on Board Ship (Revised), 1949: 'Subject to the provisions of paragraphs 2, 3 and 4 of this Article, this Convention applies to ships the keels of which are laid down subsequent to the coming into force of the Convention for the territory of registration. . . .'

² Article 17 of the Convention Concerning Accommodation on Board Fishing Vessels, 1966. Concerning the alterations, there must be prior consultation with the fishing-vessel owners' and fishermen's organizations, where such exist, and regard must be had to the practical problems involved. Provision is also made, in Article 17 (3), for the case of a vessel in the process of building or reconversion on the date of the coming into force of the Convention.

³ Article 3 (b) of the Convention Concerning the Protection of Workers against Ionising Radiations, 1960.

⁴ Ibid., Article 3 (c). Under Article 3 (d), at the end of three years from the date on which the Convention enters into force the Governing Body is to submit to the Conference a special report concerning the application of Article 3 (b) and to make such proposals as it may think appropriate for further action in regard to the matter.

of a proposed convention. The effectiveness of the machinery has been the subject of some comment at the annual Labour Conference and more particularly in 1963 when a delegate from Ceylon subjected it to a number of criticisms:

‘The unanimous conclusion arrived at was that most Asian governments were anxious to live up to their obligations to the I.L.O. but were prevented from doing so unless and until the international labour standards were drawn up in such a way as to make it possible for them to implement the corresponding legislation. A particular instance is the Plantations Convention 1958. The importance of this Convention to the Asian region cannot be overemphasized . . . but the fact remains that not one single country in Asia has found it possible to ratify the Convention, due mainly to the hurried inclusion of an unrealistic definition given to the term ‘plantation’ which in effect makes little distinction between a plantation and a small holding. . . . The present practice is for the Office to undertake a study of the subject in question and on the basis of such study to present the Conference with a report which includes suggested conclusions. My experience of such reports leaves me with the impression that these studies are largely handled by Office staff whose experience of the subject has been in the main pedagogic and theoretical. Lack of practical experience in a labour inspector’s seat or at a negotiator’s bench leads, perchance through an abundance of caution or an excess of enthusiasm, to the presentation to this Conference of proposed Conclusions burdened with detail and lacking in appreciation of the need for sufficient flexibility which makes allowance for regional or local environmental conditions. . . . In the result, even before a matter comes before the Conference, the stage is already set for the adoption of an instrument burdened with detail. . . . The situation is further aggravated by the hurried and somewhat perfunctory consideration which a Conference is able to give to the proposals. . . . However, a major improvement could be effected through the adoption of the practice of having the proposed Conclusions presented to the Conference drafted by a sufficiently representative tripartite committee of experts who may work on the basis of the Office studies. Such a step would ensure a practical approach to the problem rather than presenting the Conference with proposals based on a largely theoretical appraisal. These committees could also be greatly assisted in their work if governments were invited to indicate difficulties in the way of ratification or implementation which they anticipated when reporting on proposals.’¹

The actual procedure for the drafting and consideration of a convention is contained in Section E of the Standing Orders of the Conference. The initiative to place an item on the agenda of the Conference lies with the Governing Body.² If the item is one which implies a knowledge of the laws in force in the various countries, then the Labour Office is responsible, before a decision is taken, for placing before the Governing Body a concise statement of the existing laws and practice. Before deciding the Governing Body may, if there are special circumstances, refer the question to a preparatory technical conference for a report. If the Governing Body places an item on the agenda of the Conference, then unless it decides

¹ *Proceedings of the International Labour Conference*, 47th Session (1963), p. 106.

² See Article 10 of the Standing Orders of the Governing Body of the International Labour Organization.

otherwise, the item is to be regarded as having been referred to the Conference with a view to a double discussion. However, in a case of special urgency the Governing Body may, by a majority of three-fifths of the votes cast, decide to refer a question to the Conference with a view to a single discussion. In this case¹ the Labour Office is to communicate to governments twelve months before the opening of the session a summary report on the question containing a statement of the law and practice in the different countries and accompanied by a questionnaire. The replies to the questionnaire are to reach the Office eight months before the opening of the session and on the basis of the replies the Office is to draw up a report which may contain one or more conventions. The report is then communicated to governments, if possible not less than four months from the opening of the session at which the question is to be discussed.

When there is to be a double discussion,² the procedure is the same concerning the preliminary report and questionnaire and further report on the basis of the replies of governments. However, the purpose of this report is to indicate the principal questions which will require consideration at the Conference. The report is then sent to governments and submitted to the Conference either in full sitting or in a committee. The Conference may then decide to include the question in the agenda of the following session or ask the Governing Body to include it in the agenda of a later session. Then, within two months from the closing of the session of the Conference, the Labour Office on the basis of the replies to the questionnaire and the discussions at the Conference is to prepare one or more conventions and communicate them to governments, asking for amendments and comments. On the basis of the replies, the Office is to draw up a final report containing the text of conventions or recommendations and send it to governments not less than three months before the opening of the session of the Conference at which the question is to be discussed. Provision is also made for consulting the other Specialized Agencies and the United Nations.

The Conference decides whether it will take as its basis of discussion the conventions prepared by the Labour Office³ and, if so, whether to consider them in full Conference or refer them to a committee for a report. If the convention is considered in full Conference each clause is placed before the Conference for adoption. If the convention is referred to a committee, the Conference after receiving the report discusses the convention in the same manner as before. The provisions of a convention or recommendation when they are adopted by the Conference are referred to the Drafting Committee for the preparation of a final text which is then circulated to the delegates.

¹ See Article 38 of the Standing Orders of the Conference of the International Labour Organization.

² Ibid., Article 39.

³ Ibid., Article 40.

On receipt of the text prepared by the Drafting Committee and on consideration of any amendments the Conference proceeds to take a final vote on the adoption of the convention or recommendation.

In theory the procedure would seem to allow ample time and opportunity for extensive consultation of all the interests concerned and a thorough preparation of the draft convention or recommendation.¹ Governments are required to give reasons for their answers to the questionnaire and, amongst other questions, they are usually asked if there are any circumstances peculiar to that particular country which may render ratification of the proposed convention difficult and, if so, what provision may be suggested for accommodating the difficulty. In practice the effectiveness of the procedure will depend appreciably on the skill of the Labour Office in formulating pertinent and precise questions, the co-operation of governments in replying to the questions in detail and the craftsmanship of the draftsman in blending flexibility with the obligations essential to the effectiveness of the convention.

Conclusions

The question of flexibility in relation to international labour conventions has been the subject of much comment and criticism within the annual International Labour Conference. Representatives of both the developing and the developed States have criticized conventions on the ground that they were too inflexible or were overburdened with detail or were generally inadequate within the context of the economic and social needs of the developing States. The following comment by the Minister of Industries for Ghana, is typical:

'It would seem in this connection that some existing standards and procedures which have been formulated and adopted by the Organization have outlived their usefulness in the developing countries and now submit themselves readily for a complete overhaul. I may here refer specifically to some of the conventions and recommendations of this Organization. If these legislative instruments are to have meaning and be accepted by all governments without question then they should take the present world situation—or rather the present labour situation in the various countries of the world, particularly the developing countries—into consideration.'²

¹ *Proceedings of the International Labour Conference*, 29th Session (Montreal, 1946), Report on Constitutional Questions, p. 61: '... it must never be forgotten that the measure in which widespread ratification and application of the Conventions can be secured is determined primarily by the thoroughness with which they are prepared. Thorough technical preparation and adequate consultation of members prior to the adoption of a Convention or Recommendation by the Conference afford the best available guarantees that the decisions reached will be such as can be widely implemented. It is essential to avoid any undue rigidity of procedure in respect of the matter, since the nature of the technical preparation which is appropriate may vary widely according to the subject matter of the Convention ... the Delegation considers that the device of preparatory Conferences has been of great value ...'

² *Ibid.*, 47th Session (1963), p. 28.

At the same Conference, the delegate representing the Indian Government said:

'The formulation of international standards by the International Labour Organization involves a real dilemma. Conditions in different parts of the world differ so widely that it is hardly possible to arrive at a common denominator. Standards which are good for the advanced countries would be out of line with conditions in the developing regions. The International Labour Organization has been trying to meet this situation by introducing elements of flexibility in the texts of its conventions. But an instrument riddled with too many exemptions ceases to be an effective international instrument. On the other hand, adoption of standards on a regional basis might promote a particularism and affect the universality of the International Labour Organization. The wise course would perhaps be to have more Recommendations rather than more conventions.'¹

A number of other delegates also urged the adoption of recommendations rather than conventions² and spoke of the dangers attendant upon the introduction of so many flexibility clauses in conventions as to impair the value and uniformity of international labour standards.³ The United Kingdom delegate complained of excessive detail and of lack of provision for rapidly changing social and economic conditions.⁴

However, it may be doubted whether lack of flexibility is the principal or fundamental reason for the non-ratification of conventions. One delegate to the 1964 Conference noted the posture of a number of States who wished to appear socially progressive and voted for the adoption of conventions which it was unlikely they would be able to ratify:

'In this connection I may mention that most of the governments seem to vote for every instrument placed before this body, although they are fully conscious of the fact that, in the foreseeably distant future, they would not be in a position to ratify the

¹ *Proceedings of the International Labour Conference*, 47th Session (1963), p. 30.

² *Ibid.*, pp. 113 and 282.

³ *Ibid.*, p. 219, the workers' delegate of the Federal Republic of Germany: 'The Conventions and Recommendations are the instruments of the Organization. They have proved their value on the whole but lately one must criticise the tendency, which has strengthened, to make the material parts of Conventions more and more flexible.' *Ibid.*, p. 284, the delegate from the Netherlands: 'I understand the need for flexibility in Conventions, but such flexibility should not lead to a weakening of this international instrument. I cannot agree with some arguments made from this rostrum, namely to introduce partial ratification.'

⁴ *Ibid.*, 48th Session (1964), p. 419, the Government adviser of the United Kingdom: 'My Government sees two main risks in a Convention drawn in this way: first, the detailed form of instrument may make ratification difficult for most countries, especially for developing countries. . . . Secondly, the Convention does not take sufficient account of the need to develop social security schemes in accordance with the changing social conditions. . . . It will be clear, however, that my Government does not regard all the detailed provisions in the Convention and in the Recommendation as necessary or desirable. It strongly urges that this Convention should not be regarded as a prototype for future Conventions in the social security field. We should aim at forms of instruments more appropriate to the needs of the second half of the twentieth century. These instruments may certainly lay down the high social standards which we all seek to attain. They must also allow countries with widely differing social and economic needs and traditions to apply those standards in matters of detail in the manner most suited to the particular requirements of their own people.'

same. This, in my opinion, is the basic reason why so many conventions passed at this Conference remain unratified by member States.¹

It may frequently be difficult to determine precisely the reasons for the non-ratification of a convention and whether in a particular instance a greater measure of flexibility in the convention would have attracted a larger number of ratifications. One example, already mentioned above,² where lack of flexibility has discouraged ratification, is that of the Plantations Convention, 1958. Three further examples are the Hours of Work (Industry) Convention, 1919,³ and the excessively rigid restrictions on Light Work in the Minimum Age (non-Industrial Employment) Convention, 1932⁴ and 1937.⁵ Two illustrations may also be given of conventions which, as originally adopted, were found to be too inflexible and when the conventions were revised new flexibility devices were introduced to facilitate ratification. This was done successfully in the case of the Protection against Accidents (Dockers) Convention (Revised), 1932⁶ and the Accommodation of Ships' Crews Convention (Revised), 1949.⁷

However, apart from a limited number of exceptions, it may be maintained that non-ratification or retarded ratification of a convention has not usually been due to lack of flexibility within the convention. Since 1946, only four conventions out of more than fifty which have been adopted by the Conference make no provision for flexibility.⁸ Nor is the record of the developing States in respect to ratification discouraging. The large number of declarations, with or without modifications, on behalf of non-metropolitan countries has already been mentioned⁹ and the practice of the Organization in regard to developing States and succession to conventions ratified on their behalf will be discussed later.¹⁰

¹ Ibid., p. 250.

² See above, p. 45.

³ Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week, 1919.

⁴ Convention Concerning the Age for Admission of Children to Non-Industrial Employment, 1932.

⁵ Convention Concerning the Age for Admission of Children to Non-Industrial Employment (Revised), 1937.

⁶ Convention Concerning the Protection against Accidents of Workers Employed in Loading or Unloading Ships (Revised), 1932.

⁷ Convention Concerning Crew Accommodation on Board Ship (Revised), 1949.

⁸ They are: Convention Concerning Freedom of Association and Protection of the Right to Organize, 1948; Convention Concerning the Abolition of Penal Sanctions for Breaches of Contract of Employment by Indigenous Workers, 1955; Convention Concerning the Abolition of Forced Labour, 1957; Convention for the Partial Revision of the Conventions Adopted by the General Conference of the International Labour Organization at its First Twenty-eight Sessions for the Purpose of Making Provision for the Future Discharge of Certain Chancery Functions Entrusted by the said Conventions to the Secretary-General of the League of Nations and Introducing therein Certain Further Amendments Consequential upon the Dissolution of the League of Nations and the Amendment of the Constitution of the International Labour Organization, 1946.

⁹ See above, p. 16.

¹⁰ See below, p. 73.

The ingenuity of the Labour Office in minting new flexibility devices and the extensive variety, number and possible permutations of such devices have been dealt with in detail. Since 1919 a flexible approach has permeated the whole process of drafting, as is quite evident from the language employed and from the attempt to distinguish essentials from non-essentials and to avoid the inclusion of meticulous detail which might impede ratification. Provision has been made for exceptional and extraordinary conditions and circumstances by the frequent and vigorous use of special flexibility devices. A recommendation has been used as precursor to, or as an alternative to or as a supplement to a convention. Broad discretion has often been conferred on each member State concerning methods of implementation and concerning the interpretation of the scope of the convention or of exceptions permitted by it. Successful use has been made of ratification by parts, new legislation clauses and transitory provisions and rather less successful use of geographical area clauses and provisions for specific countries. The categories of special flexibility devices are not closed and no doubt new techniques and devices will appear together with the old, to meet new situations.

The need for such devices is acute and inescapable. Special provision must sometimes be made for federal States, for the eccentricities and technicalities of existing legislation, for collective agreements, for the disparity in economic and social conditions between States and for the discrepancies which sometimes exist within a particular State. To accommodate these situations a certain measure of flexibility is imperative.

On the other hand one must bear in mind, and balance against the need for flexibility, the desirability of uniformity, mutuality and reciprocity in international obligations. In certain cases it may be more important to have an effective convention giving rise to uniform obligations rather than a convention with numerous flexibility devices which are likely to attract a large number of ratifications. It may be inappropriate, for example, when a convention concerns fundamental human rights or conditions regulating international competition, to include special flexibility devices which would impair the value of the convention. The task of balancing uniformity and reality of obligation with flexibility is a complex and delicate one which invites and receives criticism from Conference delegations. However, an analysis of the conventions would seem to indicate that the Organization is discharging this task conscientiously and effectively.

V. Revision of International Labour Conventions

Substantial use has been made of the revision procedure for conventions for three main purposes: first, to make the provisions of conventions more

flexible, in order to facilitate their entry into force; secondly, to make the provisions of conventions more flexible to take account of changes in economic and social conditions which have occurred since their adoption; thirdly, to raise the standard provided for in a convention in the light of progress made since its adoption.¹ Revision of conventions making them more flexible in order to facilitate their entry into force was undertaken successfully in the case of the Protection against Accidents (Dockers) Convention (Revised), 1932 and the Accommodation of Crews Convention (Revised), 1949.² In the case of the Hours of Work (Coal Mines) Convention (Revised), 1935, on the other hand, the attempt was a failure,³ and in the case of the Conventions concerning (a) Wages, Hours of Work and Manning (Sea) and (b) Paid Vacations (Seafarers) the attempts have not yet succeeded.³

Instances of conventions revised in order to adapt them to technological and social changes are the Night Work (Women) Convention (revised in 1934 and 1948),³ the Night Work of Young Persons (Industry) Convention³ and the Fee-Charging Employment Agencies Convention 1949.³ In other cases the principal object of revision has been to raise the standard prescribed in a convention; for example, the Minimum Age Conventions in 1936 and 1937³ where the age of admission was raised from fourteen to fifteen and the revision of the Workmen's Compensation (Occupational Diseases) Convention, 1934.³

A convention may be drafted for the explicit purpose of revising other conventions. Thus Article 28 of the Benefits of Employment Injury Convention, 1964, states: 'This Convention revises the Workmen's Compensation (Agriculture) Convention 1921, the Workmen's Compensation (Accidents) Convention 1925, the Workmen's Compensation (Occupational Diseases) Convention 1925, and the Workmen's Compensation (Occupational Diseases) Convention (Revised) 1934.'⁴ Formal revision is necessary, however, only when a change in the obligations of an existing convention is required. The scope of a convention may be extended by the adoption of a new instrument which is formally independent of it, yet is to be read together with the previous convention.⁵

The need for expeditious, efficient and systematic machinery for revising conventions has become acute during the last few years. It is a frequent

¹ Report of the Director-General, *Proceedings of the International Labour Conference*, 48th Session (1964), p. 153.

² Ibid. The 1932 Convention is now in force for twenty-four members and the 1949 for fifteen members, including seven of the leading maritime powers.

³ Ibid.

⁴ Article 28 of the Convention Concerning Benefits in the Case of Employment Injury, 1964.

⁵ Report of the Director-General, *Proceedings of the International Labour Conference*, 48th Session (1964), p. 154.

complaint in the annual Labour Conference that many of the standards adopted during the past forty years do not correspond to current and rapidly changing economic and social conditions. As a delegate from Japan stated in 1964:

‘First, the Conference should proclaim a kind of moratorium for many years ahead to stop standard setting and activities which are applicable and necessary only for the most developed countries. . . . The only standard-setting activities which should be carried out for the time being are the revision of the existing instruments in such a way as to make them applicable to the large majority of the member States. This task may need the establishment of a special committee composed of experts, or tripartite members coming from developing countries only. . . .’¹

In 1919 no provision was made in the Constitution for revision of conventions or recommendations.² However, at the first session of the Labour Conference it was decided to include in each convention adopted a provision requiring the Governing Body at least once in ten years to present to the General Conference a report on the working of the Convention, and to consider the desirability of placing on the agenda of the Conference the question of its revision or modification.³ Subsequent sessions of the Conference until 1929 included a similar provision in conventions which they adopted.⁴ A modification was, however, introduced in 1961 by the Final Articles Revision Convention which substituted a new Final Article provision for the one contained in conventions adopted during the first thirty-two sessions of the Conference. The new Article provided: ‘At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.’⁵

In 1929 a new provision was devised⁶ and inserted in subsequent conventions stating in precise terms the effect that a revising convention should have on the existing convention. Article 7 of the Marking of Weight (Packages Transported by Vessels) Convention, 1929, thus states:

¹ *Proceedings of the International Labour Conference*, 48th Session (1964), p. 372.

² Jenks, ‘The Revision of International Labour Conventions’, *this Year Book*, 14 (1933), p. 48.

³ Article 21 of the Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week, 1919.

⁴ See Article 10 of the Convention Concerning the Creation of Minimum Wage-Fixing Machinery, 1928, and Article 16 of the Convention Concerning Sickness Insurance for Agricultural Workers, 1927.

⁵ Article 1 of the Convention Concerning the Partial Revision of the Conventions Adopted by the General Conference of the International Labour Organization at its First Thirty-Two Sessions for the Purpose of Standardising the Provisions regarding the Preparation of Reports by the Governing Body of the International Labour Office on the Working of Conventions, 1961.

⁶ See Jenks, *loc. cit.*, p. 49.

‘1. Should the Conference adopt a new Convention revising this Convention in whole or in part, the ratification by a member of the new revising Convention shall ipso jure involve denunciation of this Convention without any requirement of delay, notwithstanding the provisions of Article 5 above, if and when the new revising Convention shall have come into force.

2. As from the date of the coming into force of the new revising Convention, the present Convention shall cease to be open to ratification by the members.

3. Nevertheless, this Convention shall remain in force in its actual form and context for those members which have ratified it but have not ratified the revising Convention.’¹

This article was itself slightly modified in 1933 to provide that the denunciation should not be automatic and should only apply ‘unless the new convention otherwise provides’.²

It was in 1929 also that the first Standing Orders of the Governing Body and Conference concerning revision were adopted. The initiative for placing any question or revision on the agenda of the Conference lies with the Governing Body. When the Governing Body has to present a report on the working of a convention for the Conference to decide on the desirability of its revision either in whole or part, the Labour Office is to submit to the Governing Body all the relevant information concerning the convention.³ A draft report of the Labour Office is then to be circulated to all the members of the Organization. Six months later the Governing Body decides whether to enter the convention for revision, in whole or in part, on the agenda of the Conference and to fix the terms of the report. If it decides that revision is not desirable, then it communicates the report to the Conference. If it wishes to pursue the question further, it sends the report to member States and asks for their observations. Four months later the Governing Body then adopts its final report and defines exactly the question or questions to be placed on the agenda of the Conference.⁴ At the Conference, the Labour Office submits draft amendments on the basis of the conclusions of the report of the Governing Body.⁵ The Conference then decides whether to take as the basis of discussion the draft amendments prepared by the Labour Office and whether they are to be considered in full Conference or referred to a committee for report. If the draft amendments are considered in full Conference, each of them is placed successively

¹ Article 7 of the Convention Concerning the Marking of the Weight on Heavy Packages Transported by Vessels, 1929.

² Article 13 of the Convention Concerning Fee-Charging Employment Agencies, 1933.

³ Article 11 of the Standing Orders of the Governing Body.

⁴ See also Article 11 (b): ‘If at any time other than a time at which the Governing Body, in accordance with the provisions of a Convention, has to present to the Conference a report on the working of the said Convention, the Governing Body should decide that it is desirable to consider placing upon the agenda of the Conference the revision in whole or in part of any Convention, the Office shall notify this decision to the governments of the Members and shall ask them for their observations, drawing attention to the points which the Governing Body has considered specially worthy of attention.’

⁵ Standing Orders of the International Labour Conference, Article 44.

before the Conference for adoption. If they are referred to a committee, then the Conference, on receipt of the report of the Committee, discusses the text of each draft amendment in succession. The amendments are next referred to the Conference Drafting Committee which combines them with the unamended provisions of the convention under revision and establishes the final text in revised form, which is circulated to the delegates. The Conference then votes on the final text in accordance with Article 19 of the Constitution. As to recommendations, it was not until 1948 that formal provision was made in the Standing Orders for their revision¹ and it was not until 1962 that a formal revision of previous recommendations was undertaken with the adoption of the Vocational Training Recommendation.²

In recent years the question of the establishment of a technical revision committee has been frequently discussed in the reports both of the Director-General to the Conference³ and of the Conference itself.⁴ It was suggested that the need for such a committee was threefold. First, there was no procedure whereby a Convention which had failed to fulfil its purpose or had wholly fulfilled its purpose could be taken off the International Labour Organization's statute book.⁵ Secondly, there was no simple machinery for revising certain non-controversial provisions, of a technical or secondary nature, of a convention, which did not affect the basic obligations of the convention.⁶ Thirdly, neither the Conference nor the Governing Body had a standing revision committee which could undertake over a period of years a continuing task of systematically revising existing conventions.⁷ The Director-General in his report made it clear that the terms of reference of such a committee would not include conventions concerning fundamental human rights nor a comprehensive revision of the basic principles of a convention.⁸ Even so, it was envisaged that the committee might usefully concern itself with thirty-one conventions. Fifteen of them were to be expunged from the International Labour Organization statute book and sixteen of them to be partially revised, as in the case of the Plantations Convention, 1958, in order to make their provisions more flexible and so facilitate ratification.⁹ In relation to the statutory revision procedure, it may be pointed out that nothing prevents revision by means of the normal double discussion procedure. In fact in the series of revisions of pre-war Social Insurance Conventions undertaken during the last few years, that

¹ Standing Orders of the International Labour Conference, Article 45.

² Article XVI of the Recommendation Concerning Vocational Training, 1962.

³ Report of the Director-General, *Proceedings of the International Labour Conference*, 48th Session (1964), pp. 152-63, and Report of the Director-General, *ibid.*, 49th Session (1965), pp. 30-2.

⁴ *Ibid.*, 48th Session (1964), pp. 372 et seq.

⁵ Report of the Director-General, *ibid.*, p. 155.

⁷ *Ibid.*, pp. 157-8.

⁸ *Ibid.*, pp. 159-60.

⁶ *Ibid.*, p. 156.

⁹ *Ibid.*, p. 163.

method has invariably been used.¹ It will in any case be readily apparent that revision of conventions now plays an important role in pruning and adapting old conventions to meet current needs.

VI. *The Durability of International Labour Conventions*

1. *State Succession and International Labour Conventions*

The impact of the newly independent States on the Organization has been extensive.² One of the areas where it has been most important and wholly beneficial is in succession to obligations arising under conventions. It is now the well-established practice of the Organization that newly independent States succeed to obligations under conventions which had previously been declared applicable to their respective territories by the countries responsible for their administration and international relations. This practice, which was noted with great satisfaction by the first African Regional Conference in 1963 with respect to the new African members of the Organization³ applies to all the newly independent States without any exception.

The doctrine was first enunciated in the case of Burma in 1948 in a letter to the Director-General of the Organization. The letter stated: 'The Government of Burma recognized that the obligations resulting from the international labour Conventions ratified in respect of Burma by India prior to April 1937 continue to be binding upon the Union of Burma in accordance with the terms hereof.'⁴ The same year a similar declaration was made by Pakistan.⁵ Since then, the practice has been followed by Ceylon,⁶ Vietnam,⁷ Indonesia,⁸ Tunisia,⁹ Morocco,¹⁰ Libya,¹¹ Malaya,¹² Cameroon,¹³ Togo,¹⁴ Mali,¹⁵ Mauritania,¹⁶ Sierra Leone,¹⁷ Congo (Leopoldville),¹⁸ Cyprus,¹⁹ Gabon,²⁰ Nigeria,²¹ Central African Republic,²² Malagasy,²³ Senegal,²⁴ Chad,²⁵ Congo (Brazzaville),²⁶ Somalia,²⁷ Ivory Coast,²⁸ Dahomey,²⁹ Niger,³⁰ Tanganyika,³¹ Republic of Upper Volta,³² Jamaica,³³

¹ See *ibid.*, 48th, 49th and 50th Sessions.

² See J. F. McMahon's chapter on the International Labour Organization in *The Evolution of International Organizations* (ed. by E. Luard, 1966).

³ *I.L.O. Official Bulletin*, 43 (1960), p. 352.

⁴ *Proceedings of the International Labour Conference*, 31st Session (1948), pp. 529-30.

⁵ *Ibid.*

⁶ *I.L.O. Official Bulletin*, 31 (1948), p. 223.

⁷ *Ibid.*, 33 (1950), p. 248.

⁸ *Ibid.*, 37 (1954), p. 67.

⁹ *Ibid.*, 39 (1956), p. 67.

¹⁰ *Ibid.*

¹¹ *Ibid.*, 35 (1952), p. 85.

¹² *Ibid.*, 40 (1957), p. 463.

¹³ *Ibid.*, 43 (1960), p. 64.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, p. 65.

¹⁶ *Ibid.*, 44 (1961), p. 25.

¹⁷ *Ibid.*, p. 24.

¹⁸ *Ibid.*, 43 (1960), p. 538.

¹⁹ *Ibid.*, pp. 522-3.

²⁰ *Ibid.*, p. 523.

²¹ *Ibid.*, p. 524.

²² *Ibid.*, p. 525.

²³ *Ibid.*, p. 526.

²⁴ *Ibid.*, pp. 526-7.

²⁵ *Ibid.*, p. 528.

²⁶ *Ibid.*, p. 527.

²⁷ *Ibid.*, pp. 529-30.

²⁸ *Ibid.*, pp. 530-1.

²⁹ *Ibid.*, pp. 532-3.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*, p. 531.

³³ *Ibid.*, 46 (1963), p. 221.

Burundi,¹ Uganda,² Trinidad and Tobago,³ Kenya,⁴ Laos,⁵ Malta,⁶ Zambia,⁷ Malawi,⁸ Yemen,⁹ Guyana,¹⁰ Singapore,¹¹ and it seems unlikely that there will be any deviation from it in future.

2. *Withdrawal from the Organization and Obligations under Conventions*

Whereas the question of State succession belongs to the constitutional practice of the Organization, the effect of withdrawal from the Organization on obligations under labour conventions is provided for in the Constitution. Article 1 (5) states that 'when a member has ratified any international labour Convention, such withdrawal shall not affect the continued validity for the period provided for in the Convention of all obligations arising hereunder or relating hereto'.¹² The practice of the Organization in the case of the Federal Republic of Germany,¹³ Japan,¹⁴ Austria,¹⁵ Venezuela,¹⁶ Roumania¹⁷ and Spain,¹⁸ conformed to this provision.

However, a new situation has arisen in respect to the Republic of South Africa. The Government of that country in a letter to the Director-General of the Organization concerning its withdrawal from the Organization stated:

'In view of the denial to South Africa of its basic rights as a member, the South African Government accordingly does not consider itself bound by the provisions of the Constitution, in terms of which two years' notice of termination of membership must be given to the Organization and as from the date of notification to the Director-General of South Africa's withdrawal, all obligations concerning the Organization will be regarded as having been terminated.'¹⁹

The Director-General interpreted, 'all obligations' as including obligations arising under conventions ratified by South Africa. In his letter replying to the Government he invoked Article 5 (1) of the Constitution and concluded: 'In accordance with the terms of the Constitution, South Africa will continue therefore to be bound by all obligations arising under or relating to Conventions to which she is a party for the periods provided for therein.'²⁰ In view of the explicit provision of the Constitution in Article 5 (1), accepted by South Africa when she was admitted to the Organization, her attempt to divest herself of any of the obligations arising under conventions she has ratified, does not appear to be justified. This view is

¹ *I.L.O. Official Bulletin*, 31 (1948), p. 222.

² *Ibid.*, p. 345.

³ *Ibid.*, p. 346.

⁴ *Ibid.* 47 (1964), p. 32.

⁵ *Ibid.*, p. 101.

⁶ *Ibid.*, 48 (1965), p. 33.

⁷ *Ibid.*, p. 34.

⁸ *Ibid.*, p. 243.

⁹ *Ibid.*, p. 245.

¹⁰ *Ibid.* 49 (1966), p. 292.

¹¹ *Ibid.*, p. 35.

¹² Article 1 (5) of the Constitution of the International Labour Organization. This article was incorporated in the Constitution when it was amended in 1945.

¹³ *I.L.O. Official Bulletin*, 35 (1952), p. 341. See also the case of Nicaragua, *ibid.*, 26 (1943), p. 126.

¹⁴ *Ibid.* 35 (1952), p. 342: 'The international labour Conventions which had been ratified by Japan prior to its withdrawal from the Organization and which are therefore recognized as being binding upon Japan by its Government, as confirmed by the above statement, are as follows. . . .'

¹⁵ *Ibid.*, 30 (1947), p. 70.

¹⁶ *Ibid.*, 41 (1958), p. 483.

¹⁷ *Ibid.*, 39 (1956), p. 637.

¹⁸ *Ibid.*, p. 638.

¹⁹ *Ibid.*, 49 (1966), pp. 199-203.

²⁰ *Ibid.*

supported not only by the Constitution but also by the practice of the Organization both prior and subsequent to the inclusion of Article 1 (5) as part of the Constitution in 1945.¹

3. *Denunciation of Conventions*

The first convention adopted by the Labour Conference contained a provision enabling a State, after a certain period of time, to denounce a convention. Article 20 of the Hours of Work (Industry) Convention, 1919, provided:

'A member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered with the International Labour Office.'²

This clause is contained in all the conventions adopted between 1919 and 1927.

Conventions adopted from 1928 onwards may be denounced by giving a period of notice, usually of one year, within an interval, normally of six or twelve months, from the expiration of a specified period (normally ten or five years from their first coming into force or of succeeding periods of the same duration).³ This new formula appears in Article 9 of the Minimum Wage-Fixing Machinery Convention, 1928, which states:

A member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered with the International Labour Office. Each member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph exercise the right of denunciation provided for in this Article, will be bound for another period of five years and, thereafter, may denounce this Convention at the expiration of each period of five years under the terms provided for in this Article.⁴

Since 1928 a similar, if not identical, provision has been inserted in most conventions.⁵

With a few exceptions, denunciations occur as an incident to the ratification of revising conventions. A State wishing to denounce a convention will

¹ *International Labour Code* (1951), vol. 1, p. xcvi.

² Article 20, of the Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week, 1919.

³ *International Labour Code* (1951), vol. 1, p. xcix.

⁴ Article 9 of the Convention Concerning the Creation of Minimum Wage-Fixing Machinery, 1928.

⁵ See, for example, Article 21 of the Convention Concerning Accommodation on Board Fishing Vessels, 1966, and Article 18 of the Convention Concerning Fishermen's Certificates of Competency, 1966.

normally be careful to emphasize that its action is prompted by ratification of a subsequent convention. This may be illustrated by a letter from the Republic of Mauritania to the Director-General: '... I have the honour to inform you of the denunciation of Convention No. 4 by the Government of Mauritania. This denunciation is only a mere regularisation of the situation because the ratification of convention No. 89 by Mauritania necessarily entails the conformity of Article 13 of the Labour Code as regards the prohibition of night work in respect of women employed in industrial undertakings in health and welfare services who are not ordinarily engaged in manual work.'¹ However, on at least two occasions denunciation was not merely incidental to the ratification of revising conventions.²

In this connection, mention may also be made of a case of cancellation of a ratification, namely, the New Zealand ratification of the Reduction of Hours of Work (Textiles) Convention, 1937. The cancellation is to be explained by the fact that the Convention had not entered into force and the New Zealand ratification had stood alone for twenty-eight years.³

The conclusion to be drawn from the practice of the Organization is that although conventions usually provide for their denunciation the provision is rarely invoked except in consequence of the ratification of a revising convention. Indeed, since 1929 most conventions provide that ratification of a revising convention *ipso jure* involves denunciation of an existing convention.⁴

4. *Effect of War on Obligations under Conventions*

The legal effect of war on obligations arising under international labour conventions was dealt with in a memorandum drawn up by the Labour Office in 1945. This memorandum stated:

There would not appear to be any ground for regarding the obligations resulting

¹ *I.L.O. Official Bulletin*, 48 (1965), p. 329. See also *ibid.*, 49 (1966), pp. 43-44, and 30 (1947), p. 370.

² *Ibid.*, 23 (1938), p. 66, concerning India and Denunciation of the Unemployment Convention, 1919 and the Minutes of the Governing Body 158th Session, 1964, p. 3, concerning Czechoslovakia and Denunciation of the Maintenance of Migrants' Pension Rights Convention. The latter denunciation gave rise to a question from one of the workers' delegates in the Governing Body to which the Director-General replied that, '... while governments sometimes gave their reasons for denouncing a Convention, they were not bound to do so. In the case mentioned by Mr. Collison, the letter of denunciation had given no explanation ...'.

³ *Ibid.*, 49 (1966), pp. 209-11.

⁴ Article 7 of the Convention Concerning the Marking of the Weight on Heavy Packages Transported by Vessels, 1929: '1. Should the Conference adopt a new Convention revising this Convention in whole or in part, the ratification by a member of the new revising Convention shall *ipso jure* involve denunciation of this Convention without any requirement of delay, notwithstanding the provisions of Article 5 above, if and when the new revising Convention shall have come into force. 2. As from the date of the coming into force of the new revising Convention, the present Convention shall cease to be open to ratification by the members. 3. Nevertheless this Convention shall remain in force in its actual form and content for those members which have ratified it but have not ratified the revising Convention.'

from the Conventions as being abrogated, even as between opposing belligerents, by the existence of a state of war, but many of these obligations must no doubt be regarded as being in a state of suspense as between the opposing belligerents for the duration of the war. . . . It would appear therefore that although as a matter of law the nexus of obligations created during the period 1919-39 has not been destroyed by the war, the *de facto* position as regards the application of these obligations is liable to be highly unsatisfactory after the war unless appropriate action is taken at the end of the war to ensure that the obligations which survive in law again become practically effective.¹

The views then expressed have since been endorsed by the Committee of Experts on the Application of Conventions and Recommendations,² as well as by the Conference Committee on the Application of Conventions and Recommendations;³ and the subsequent practice of the Organization has been based on the memorandum.⁴

The durability of labour conventions, particularly in regard to State succession and the continuance of obligations even after withdrawal from the Organization, gives them a character which is somewhat exceptional in international treaties.

VII. *Reservations*

The consistent constitutional practice of the Organization has been that reservations to labour conventions are impermissible. No exception has ever been made and the practice has become well established and been supported with such cogency before the International Court of Justice and the International Law Commission that it is extremely unlikely that it will be changed. The practice, which is exceptional in international law,⁵ has been justified by the Labour Office on the ground that the circumstances prompting such an approach are themselves extraordinary and flow from the unique juridical character and function of international labour conventions.

The International Court of Justice, in its Advisory Opinion of May 1951 concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, reached the conclusion, by a narrow majority,⁶ that under certain conditions reservations were permissible. However, the International Labour Office, in a Memorandum submitted to the Court during the written proceedings,⁷ had urged that on account of the peculiar and unique attributes of the Organization, it should be allowed, by way of

¹ See Minutes of the Governing Body, 95th Session, p. 165.

² See 27 S.A.R. Appendix 5 and 29 S.A.R. Appendices 5-6.

³ See 27 R.P. 439-40 and 29 R.P. 506.

⁴ *International Labour Code* (1951), vol. 1, pp. xcvi-xcvii. See also *I.L.O. Official Bulletin*, 27 (1944), p. 244.

⁵ See McNair, *Law of Treaties*, pp. 158-77.

⁶ Advisory Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *I.C.J. Reports*, 1951, pp. 29-30.

⁷ *I.C.J. Pleadings*, 1951, pp. 216-82.

exception, to adhere to its persistent policy of refusing to accept any ratification of an international labour convention given subject to reservations:

It has been the consistent view of the International Labour Organization, since its establishment, that reservations are not admissible. This view is based upon and supported by the consistent practice of the International Labour Organization and by the practice of the League of Nations during the period from 1920-1946 when the League was responsible for the registration of ratifications of international labour conventions. 1,188 ratifications of international labour conventions, distributed over 95 conventions and 60 parties, have been registered over a period of thirty years, and none of these ratifications is subject to a substantive reservation qualifying the terms of the convention. In each case in which a ratification subject to a reservation has been presented for registration, the inadmissibility of reservations to international labour conventions has been drawn to the attention of the government concerned; in each case the government concerned has concurred in the view put forward by the International Labour Office; in certain cases the proposed reservations have subsequently been withdrawn and the convention ratified without reservations; in the other cases the conventions have remained unratified; in no case has a ratification been registered subject to a substantive reservation.¹

In its opinion the Court made no comment. But the International Law Commission, when the point came before it, noted:

'Because of its constitutional structure, the established practice of the International Labour Organization, as described in the Written Statement dated 12 January 1951 of the Organization submitted to the International Court of Justice in the case of reservations to the Convention on Genocide, excludes the possibility of reservations to international labour conventions. However, the texts of these Conventions frequently take account of the special conditions prevailing in particular countries by making such exceptional provisions for them as will admit of their proceeding to ratification; indeed, this course is enjoined on the General Conference by Article 19 (3) and other Articles of the Constitution of the Organization.'²

The Labour Office first adopted the view that reservations to international labour conventions were inadmissible in 1920, when the Polish Government requested the advice of the Labour Office on the question whether it would be possible to ratify three international labour conventions subject to reservations.³ The Labour Office, after the usual disclaimer to the effect that it had no authority to interpret conventions,⁴ proceeded to reply that reservations would not be possible and that 'such procedure would appear to be contrary to the spirit of the labour part of the Treaty'.⁴ The posture adopted by the Labour Office was justified by it on three grounds. First, if any modifications were necessary they should have been considered by the Conference and inserted in the convention itself.⁴

¹ *I.C.J. Pleadings*, 1951, pp. 227-8.

² See *General Assembly, Official Records*, 6th Session, Supplement No. 9, A/1858, p. 4.

³ *I.C.J. Pleadings*, 1951, pp. 228, 237-41.

⁴ *Ibid.*, p. 239.

Secondly, in the case of conventions adopted by the International Labour Conference, there is no exchange of ratifications and so no opportunity for other States to express assent or dissent when ratifications are communicated to the Secretary-General.¹ Thirdly, that as labour conventions are negotiated by a tripartite body, this body and not governments alone should have the chance of acquiescing in a reservation put forward by a country.² The Polish Government, accepting the view of the Labour Office, subsequently ratified one of the conventions without a reservation and refrained from ratifying the other two.³

A year later the Indian Government informed the Secretary-General of the League of Nations when ratifying certain conventions that if ratification subject to reservations was permissible it was also prepared to ratify the Minimum Age (Industry) Convention, 1919. However, the Labour Office advised that ratification subject to reservations was not permissible and the Government accepted that view,⁴ as it did again in 1937 in connection with the Minimum Age (Sea) Convention (Revised), 1936.⁵ In 1928 the Cuban Government communicated to the Secretary-General of the League eight instruments of ratification, three of which contained reservations.⁶ The Director of the Labour Office, in reply to an inquiry by the Secretary-General stated that such purported reservations were inadmissible. This statement was accepted by the Secretary-General of the League and by the Cuban Government which subsequently ratified the Hours of Work (Industry) Convention, 1919, without reservation in 1934 but did not ratify the other two conventions.⁷ The Director in his reply to the Cuban Government invoked the previous jurisprudence of the Labour Office on this question, adverting in particular to the provision in Article 19 which permitted the Conference to take cognizance of any special circumstances prevailing within a State when formulating a convention.⁸ The Director concluded: '*Les dispositions d'un projet de convention forment un tout en cas de ratification, doivent être appliquées intégralement et sans réserves.*'⁹ He then reiterated the arguments already addressed to the Polish Government.¹⁰ Again in 1936 when a decree was submitted to the Peruvian Congress proposing the ratification of certain labour conventions subject to reservations,¹¹ the Acting Director of the

¹ *I.C.J. Pleadings* 1951, p. 239.

² *Ibid.*

³ *Ibid.*, p. 228. See also *I.L.O. Official Bulletin*, 2 (1920), p. 18.

⁴ *I.C.J. Reports*, 1951, pp. 228-9, 241; *I.L.O. Official Bulletin*, 4 (1922), pp. 290-7; Report of the Director-General, *Proceedings of the International Labour Conference*, 3rd Session (1921), vol. 2, pp. 1043-50.

⁵ *I.L.O. Official Bulletin*, 22 (1937), p. 199.

⁶ *I.C.J. Pleadings*, 1951, p. 229: (1) The Hours of Work (Industry) Convention, 1919; (2) The Weekly Rest (Industry) Convention, 1921; (3) Inspection of Emigrants Convention, 1926.

⁷ *Ibid.*

⁸ Article 19, paragraph 3.

⁹ *I.C.J. Pleadings*, 1951, p. 247.

¹⁰ *Ibid.*

¹¹ *Ibid.*, p. 229.

Labour Office drew the attention of the Peruvian Government to the 'legal impossibility'¹ of such reservations. The reservations were then withdrawn.²

The views of the Labour Office concerning reservations seem to have met with the general acquiescence of the members of the Organization³ and obtained the explicit approbation of Great Britain in the House of Commons on 9 May 1923, when the Minister of Labour stated that two successive Ministers of Labour had advised the Government against ratification subject to reservations.⁴

In 1927, in a Memorandum submitted to the League Committee of Experts for the Codification of International Law, the Director defended the policy of the Organization on three grounds: (1) the rights which the treaties have conferred on non-governmental interests in regard to the adoption of international labour conventions would be overruled if the consent of governments alone should suffice to modify the substance and detract from the effect of the conventions;⁵ (2) the Constitution already imposed an obligation on the Conference⁶ to attempt to accommodate the special circumstances of each country when formulating a convention; (3) the admission of reservations would serve only to frustrate the object of the Organization and the function of international labour conventions which was to establish a network of mutual obligations among the various States and it was deemed essential to preserve exact reciprocity in these obligations.⁷ The Committee reported⁸ that the main contention of the Memorandum was accurate and that 'it rightly draws attention to the objections to any unilateral reservation or modification which a State might claim to attach to its assent'.⁹ The Report of this Committee and the Memorandum of the Labour Office were then distributed to all the Members of the League.¹⁰

Proposals to overcome the objection based on the tripartite nature of the Conference which adopted conventions, were examined by the Governing Body of the International Labour Organization in 1932. One proposal was for introducing a procedure for the amendment of conventions;¹¹ another contemplated permitting reservations approved by a Reservations Committee of government, employer and worker representatives to be appointed by the International Labour Conference and including *ad hoc* members

¹ *I.C.J. Pleadings*, 1951, p. 253.

² *Ibid.*, pp. 256-7.

³ *Ibid.*, p. 229.

⁴ *Hansard*, H.C., vol. 163, 1923, cols. 2418-39.

⁵ *I.C.J. Pleadings*, 1951, p. 230.

⁶ Article 19 of the Constitution of the I.L.O.

⁷ *I.C.J. Pleadings*, 1951, p. 231; League of Nations Doc. C. 212, 1927, V; and *League of Nations, Official Journal* (1927), pp. 882-4.

⁸ See League of Nations Doc. C. 211, 1927, V; and *League of Nations, Official Journal* (1927), pp. 880-2.

⁹ *I.C.J. Pleadings*, 1951, p. 231.

¹⁰ *Ibid.*

¹¹ See *Minutes of the 60th Session of the Governing Body of the I.L.O.* (Madrid, 1932), pp. 175-6.

appointed by the Governing Body for each particular case on the basis of their special technical knowledge of the convention in question.¹ The issue arose because of difficulties encountered in connection with the ratification of the Convention Concerning the Protection against Accidents of Workers Employed in Loading or Unloading Ships.² In addition, at the previous session a suggestion had been made for the recommendation of a proposal originally made in 1923, that members whose legislation, while not in exact conformity with the requirements of a convention, was almost identical therewith, might be authorized to deposit a conditional ratification with the Secretary-General, and the Conference at its next session would determine, on the receipt of a report from a committee appointed to examine the matter, whether its conditional ratification could be accepted as satisfactory.³

Another interesting suggestion was submitted to the Labour Office by Dr. A. D. McNair, envisaging the possibility of allowing reservations on points of detail:

‘Every convention, and, upon its periodical revision, every revised convention, shall contain a clause running somewhat as follows:

‘In order to obviate difficulties in the way of ratification arising from points of minor discrepancy between the text of this convention and the text of national laws or decrees in existence or to be passed to give effect to this convention each member may submit to the Reservations Committee of the Conference the text of any reservation which it may desire to make. The Reservations Committee shall take such proposed reservations into consideration, and if, acting by a majority of not less than two-thirds, they are of opinion that the reservation is reasonable having regard to the legal system and other circumstances prevailing in the country of the member proposing it and can be permitted without endangering the uniformity of the application of this convention, they shall notify their assent to the member. Thereupon a ratification to which such reservation is attached shall become effective unless and until it shall be disallowed by the General Conference of the Organization at the session next ensuing.’⁴

Dr. McNair also suggested the constitution of a Reservations Committee as a standing committee of the Conference, consisting of six members, of whom four were to be permanent members (two government delegates, one employer and one worker delegate) and two non-permanent members appointed *ad hoc* by the Governing Body and having special technical knowledge with reference to each convention.⁵

The Labour Office, commenting on the above proposals, expressed a preference for the amendment procedure rather than ratification with reservations. It acknowledged that the distinction between the two was more formal than substantial but it believed that the amendment procedure would be more conducive to precision and clarity.⁶ However, after stating

¹ *I.C.J. Pleadings*, 1951, p. 231.

² *Ibid.*, p. 258.

³ *Ibid.* See also Document submitted by the International Labour Office to the Standing Orders Committee, I.L.O. Doc. C.R. 8, 1932.

⁴ *I.C.J. Pleadings*, 1951, p. 259.

⁵ *Ibid.*

⁶ *Ibid.*, pp. 259–60.

its view that the amendment procedure was preferable, the Labour Office went on to urge that neither proposal should be adopted. The criticisms which the Labour Office directed at the amendment procedure were that if it were made too easy to adopt reservations then the obligations embodied in conventions would be gradually excised¹ and if it were made too difficult then the object of such procedure would be frustrated. Instead, the Labour Office suggested that the procedure for revision² which had just been introduced to deal with the Workers Convention should be given a probationary period to see whether, in the light of further experience, it rendered unnecessary the establishment of any special machinery for amending or accepting reservations to international labour conventions.³ The Governing Body, on the basis of the report of its Standing Orders Committee, decided to take no immediate action on the matter and it has never taken up the question again.⁴

The Labour Office, when registering conventions with the Secretary-General of the United Nations, does so in the form of a statement that the ratifications of the conventions are not subject to any reservations instead of in the form of a statement that the text registered includes all reservations made by the parties.⁵

The Memorandum submitted by the Labour Office to the International Court is careful to emphasize the distinction between reservations, which have always been regarded as inadmissible, and cases in which conventions permit members to make, when ratifying or shortly thereafter, various types of declaration qualifying the obligations assumed by ratification.⁶ Certain conventions contain optional parts⁷ or alternative parts⁸ or optional annexes⁹ and provide that, when ratifying, members shall make declarations indicating the extent of the obligations which they undertake.¹⁰ Some conventions permit certain countries to substitute a prescribed standard lower than the normal standard laid down by the convention provided that the member makes an appropriate declaration when ratifying the convention.¹¹ The obligation to apply ratified conventions to non-metropolitan territories is a qualified one under the terms of the Constitution itself which provides (Articles 35 (1) and (2)) for the communication

¹ *I.C.J. Pleadings*, 1951, p. 260.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*, p. 231.

⁵ *Ibid.*, pp. 231-2 and 261-3.

⁶ *Ibid.*, p. 232.

⁷ *Ibid.*: Convention Concerning Statistics of Wages and Hours of Work, 1938; Labour Inspection Convention, 1947.

⁸ *Ibid.*: Fee-Charging Employment Agencies Convention (Revised), 1949.

⁹ *Ibid.*: Migration for Employment Convention (Revised), 1949.

¹⁰ *Ibid.*: Convention Concerning Statistics of Wages and Hours of Work, 1938, Article 2; Labour Inspection Convention, 1947, Article 25; Fee-Charging Employment Agencies Convention (Revised), 1949, Article 2; Migration for Employment Convention (Revised), 1949, Article 14.

¹¹ *Ibid.*: Medical Examination of Young Persons (Industry) Convention, 1946, Article 9; Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946, Article 9; Night Work of Young Persons (Industry) Convention (Revised), 1948, Article 7.

to the Director-General of declarations stating the extent to which the member undertakes that the provisions of the convention will be applied to non-metropolitan territories and giving such particulars as may be prescribed by the convention; the particulars prescribed by the individual conventions include particulars of the modifications subject to which the convention will be applied to the various non-metropolitan territories.¹ The Memorandum concludes:

‘In all of these cases the qualifications of the obligations assumed by ratification which are permissible and the procedure to be followed by a Member wishing to qualify its obligations are defined by the convention itself; they are therefore a part of the terms of the convention as approved by the Conference when adopting the convention and both from a legal and from a practical point of view are in no way comparable to reservations.’²

The Memorandum notes three other types of case in which limitations upon, or explanations of, the assent given to a convention are to be distinguished from reservations. Sometimes conventions have been ratified conditionally upon ratification by other members; the distinction between ratification subject to a suspensive condition and ratification subject to a reservation appears, however, to be generally recognized in international practice.³ Sometimes also the instrument of ratification has been so drafted as to limit geographically the extent of the obligations undertaken. For example, in the case of the ratification by India of the Conventions Concerning Workmen’s Compensation for Occupational Diseases, 1925 (Convention No. 18), and Equality of Treatment for National and Foreign Workers as Regards Workmen’s Compensation for Accidents, 1925 (Convention No. 19), the ratification was limited to British India and was not extended to the Indian States.⁴ On another occasion in connection with the Convention Concerning Freedom of Association and Protection of the Right to Organize, 1948, the ratification was limited to Great Britain and did not include Northern Ireland.⁵ No question has ever been raised concerning the validity of such a limitation. Again, in their instruments of ratification members have sometimes placed on record their understanding of the meaning to be attached to a particular provision of a convention, generally specifying that in so stating their understanding of the position they are not to be regarded as making a reservation.⁶ So far no question has ever arisen in regard to the effect of such understandings.⁷

The argument advanced by the International Labour Office in justification of its resistance to reservations is therefore that special considerations apply to international labour conventions⁸ because:

¹ *I.C.J. Pleadings*, 1951, pp. 232-3.

³ *Ibid.*, p. 234; see also pp. 264-5.

⁶ *Ibid.*, pp. 272-3.

⁴ *Ibid.*, pp. 266-7.

⁷ *Ibid.*, p. 234.

² *Ibid.*, pp. 233-34.

⁵ *Ibid.*, p. 271.

⁸ *Ibid.*, p. 235.

(i) They are adopted by a Conference with a unique tripartite composition by a special procedure.¹

(ii) The Constitution of the Organization requires that a convention, once adopted, shall be submitted to the competent national authority for consideration of its ratification.²

(iii) The Constitution also provides tripartite machinery which may be used for the effective supervision and application of labour conventions.³

(iv) Labour conventions are designed to promote uniformity of conditions and such purpose would be frustrated if reservations were permitted,⁴ so derogating from the international network of mutual obligations.

(v) The Constitution of the Organization already makes provision for modifying the provisions of conventions to meet special circumstances.⁵ So far the Labour Office has proved most ingenious and effective in designing such flexibility clauses.⁶

¹ *I.C.J. Pleadings*, 1951, p. 235 and pp. 118-19.

² *Ibid.*, p. 235 and pp. 221-2.

³ *Ibid.*, pp. 235-6 and 224-6. Many of the conventions leave a wide range of questions to national discretion but provide that the discretion left to each Member shall be exercised after consultation with the organizations of employers and workers concerned (e.g. Hours of Work (Industry) Convention, 1919, Article 6 (2); Safety Provisions (Building) Convention, 1937, Article 2 (2); Employment Service Convention, 1948, Article 5; Night Work of Young Persons (Industry) Convention (Revised), 1948, Articles 2 (3) and 3 (2); Accommodation of Crews Convention (Revised), 1949, Article 1 (5); Labour Clauses (Public Contracts) Convention, Articles 1 (4) and (5); Protection of Wages Convention, 1949, Article 2). Sometimes the discretion left to members takes the form of a provision permitting certain requirements of the convention to be waived or varied by agreement between the organizations concerned (e.g. Hours of Work (Industry) Convention, 1919, Articles 2 (6) and 5). Each of the members agrees by the Constitution (Article 22) to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of the conventions to which it is a party. These reports are to be made in such a form and are to contain such particulars as the Governing Body may request (Article 22). The form of report approved by the Governing Body currently in use always includes a question requesting information concerning observations received from the organizations of employers and workers concerned regarding the practical application of the convention. The Constitution provides that each member shall communicate to the representative organizations of employers and workpeople recognized for the purpose of the nomination of delegates to the Conference copies of these reports (Article 23 (2)), a summary of which the Director-General is to lay before the next meeting of the Conference. (Article 23 (1)); *ibid.*, p. 225.

⁴ *Ibid.*, p. 236.

⁵ Article 19, paragraph 3, of the Constitution of the I.L.O.

⁶ *I.C.J. Pleadings*, 1951, p. 224: 'A number of conventions contain articles embodying specific modifications of their provisions in respect of named States (Hours of Work (Industry) Convention, 1919, Articles 9, 10, 11, 12 and 13; Night Work (Women) Convention, 1919, Article 5; Minimum Age (Industry) Convention, 1919, Articles 5 and 6; Night Work of Young Persons (Industry) Convention, 1919, Articles 5 and 6; Minimum Age (Trimmers and Stokers) Convention, 1921, Article 3 (c); Minimum Age (Non-Industrial Employment) Convention, 1932, Article 9; Night Work (Women) Convention (Revised), 1934, Article 5; Minimum Age (Industry) Convention (Revised), 1937, Articles 6, 7 and 8; Minimum Age (Non-Industrial Employment) Convention (Revised), 1937, Article 9; Social Security (Seafarers) Convention, 1946, Article 1 (2) (a) (v); Seafarers' Pensions Convention, 1946, Articles 2 (2) (a) (v); Medical Examination of Young Persons (Industry) Convention, 1946, Article 10; Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946, Article 8; Night Work (Women) Convention (Revised), 1948, Articles 10 and 11; Night Work of Young Persons (Industry) Convention (Revised), 1948, Articles 8 and 9). Some of these conventions permit the amendment of these articles by a special procedure involving the adoption of an amendment by the International Labour Conference and ratification thereof by the member or

(vi) The Constitution provides for a system of reports as an alternative to the acceptance of international obligations in cases in which a member is not in a position to accept the full obligations of a convention.¹

The recent introduction of a technical revision committee, has gone some way towards meeting the need for machinery to amend and revise conventions.² However, the Organization is still likely to remain inflexible in its opposition to reservations. This policy seems justified on account of the tripartite character of the Organization,³ the desirability of uniformity of standards and the fact that provision is usually made within a convention for extraordinary economic and social conditions. Finally, one may note that the policy is now firmly established in practice as more than 3,250 ratifications of conventions have been received without a single one which either the Organization or any of the parties concerned regard as containing a reservation.

VIII. *Interpretation*

Any ambiguity or obscurity giving rise to the need for interpretation is intensified in the case of an international labour convention, a multi-partite instrument, adopted by a tripartite body, often of a highly technical or general nature and to be applied to widely disparate economic and social conditions.⁴ The attendant danger of a lack of uniformity in the standards applied in different countries as a result of conflicting interpretations of the same convention required the establishment of some machinery for the authoritative determination of questions of interpretation.⁵

members concerned (Minimum Age (Industry) Convention (Revised), 1937, Article 9; Minimum Age (Non-Industrial Employment) Convention (Revised), 1937, Article 9; Medical Examination of Young Persons (Industry) Convention, 1946, Article 10; Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946, Article 8; Night Work (Women) Convention (Revised), 1948, Article 12; Night Work of Young Persons (Industry) Convention (Revised), 1948, Article 10).'

¹ Ibid., p. 236.

² See Report of the Director-General, *Proceedings of the International Labour Conference*, 49th Session (1965), pp. 30-32.

³ See Jenks, *The International Protection of Trade Union Freedom* (1957), p. 547: 'It is, therefore, legitimate to conclude that while other factors have had some part in bringing about general recognition of the inadmissibility of reservations to international labour Conventions, the essential basis of the inadmissibility of such reservations is the tripartite character of the Organization.'

⁴ C. H. Dillon, *International Labour Conventions* (1942), p. 126.

⁵ Report of the Director-General, *Proceedings of the International Labour Conference*, 3rd Session (1921), p. 117: 'The whole of the International Labour Organisation therefore is interested in and may be affected by the interpretations which are given to the instrument which it has created. The intentions of the Conference might be entirely falsified if each country were obliged to interpret the Articles of the convention for itself because there was no authority whose advice it could seek.' See also, Dillon, op. cit. in the preceding note, p. 126; *Minutes of the 55th Session of the Governing Body of the I.L.O.* (1931), p. 181; and *Minutes of the 64th Session* (1933), p. 451.

Formal provision for such machinery was embodied in Article 37 of the Constitution, which provided:

‘Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the members in pursuance of the provisions of the Constitution shall be referred for decision to the International Court of Justice.’¹

However, although special arrangements were made between the Court and the International Labour Organization to enable the Court to appoint a special chamber in order to determine labour disputes,² only one case involving the interpretation of an international labour convention was brought before the Permanent Court.³ The reasons for this reluctance to bring cases before the Court are not difficult to discern and are indeed confirmed by more recent trends in other Specialized Agencies.⁴ Although most of these organizations make a formal genuflection in their constitutive instrument in the direction of the International Court, a more expeditious, informal, and flexible method of settling disputes is usually desired. Therefore, when the International Labour Constitution was amended at

¹ Article 37 of the Constitution of the I.L.O. And see the position of the Soviet Union in 1954 in *I.L.O. Official Bulletin*, 37 (1954), p. 229: ‘The Legation considers it necessary to state further that the Soviet Union will not consider itself bound by the provision of paragraph 1 of Article 37 of the Constitution of the International Labour Organisation . . . and of paragraph 2 of Article 37. . . . As regards the jurisdiction of the International Court, the Soviet Union will maintain the position that it has adopted hitherto namely that for reference of any dispute to the International Court or any tribunal for decision the consent of all parties to the dispute is essential in each individual case.’ However, such a purported reservation was not accepted.

² See Article 36, *P.C.I.J.*, Series D, No. 1: ‘Labour cases, particularly cases referred to in Part XIII (Labour) of the Treaty of Versailles and the corresponding positions of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions. The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. In the absence of such demand, the Court will sit with the number of judges provided for in Article 25. On all occasions the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests. If there is a national of one only of the parties sitting as a judge in the Chambers referred to in the preceding paragraph, the President will invite one of the other judges to retire in favour of a judge chosen by the other party in accordance with Article 31. The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of ‘Assessors for Labour Cases’ composed of two persons nominated by each member of the League of Nations and an equivalent number nominated by the Governing Body of the Labour Office. The Governing Body will nominate, as to one-half, representatives of the workers, and, as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding articles of the Treaties of Peace. In Labour Cases the International Labour Organisation shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all written proceedings.’ See also *Records of the First Assembly of the League of Nations*, Committee 1, pp. 557–65.

³ *Interpretation of the Convention of 1919 Concerning the Employment of Women during the Night*, *P.C.I.J.*, Series A/B, No. 50.

⁴ See McMahon, ‘The Court of the European Communities, Judicial Interpretation and International Organisation,’ this *Year Book*, 37 (1961), pp. 320–1. See also Jenks, ‘The Status of International Organisations in relation to the International Court of Justice,’ *Transactions of the Grotius Society*, 32 (1947), pp. 1–41.

Montreal in 1946, Article 37 was changed to allow for the establishment of a tribunal comparable to one already functioning within the Food and Agriculture Organization.¹ Paragraph 2 of Article 37 now provided:

‘Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgment or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the members of the Organisation and any observations which they may make thereon shall be brought before the conference.’²

Such a tribunal has never been established. In practice, the need for a tribunal had already been partly fulfilled by the International Labour Office, which since 1921 had given, when requested by States, an advisory opinion on the meaning to be ascribed to an ambiguous provision of a convention or recommendation. However, the Labour Office from the very beginning was extremely careful to emphasize that its opinion had no official status and the opinion has always been given with an explicit disclaimer to this effect:

‘Although the Treaty of Peace has not conferred on the International Labour Office any special authority as regards the interpretation of the text of the Draft Conventions and Recommendations adopted by the Conference, the Office is in a position to examine the records and documents of the meetings of the Conference and of its various Commissions and is thereby able frequently to assist Governments in the elucidation of doubtful points.

‘Several Governments have addressed enquiries to the Office asking for assistance in the significance to be attached to the provisions of the Draft Conventions and Recommendations, replies to which have involved in some instances long and careful examination of the relative documents. In view of the fact that many Governments are at present reconsidering their legislation on labour matters with the object of bringing it into conformity with the decisions of the International Labour Conference, it is felt that information already furnished for this purpose might usefully be made generally available and it is accordingly proposed to print in the Official Bulletin from time to time the more interesting correspondence which has been or may be exchanged on these subjects.’³

So far the Labour Office has given about ninety-six such opinions.⁴

¹ *Proceedings of the International Labour Conference*, 29th Session (Montreal, 1946), Report of the Conference Delegation on Constitutional Questions, pp. 35–65. See also *International Labour Code* (1951), vol. I, p. cviii: ‘... this provision was included in the Constitution at a time when it was uncertain whether the International Labour Organisation would enjoy direct access to the advisory jurisdiction of the International Court as reconstituted as a principal organ of the United Nations, and in view of the conclusion of satisfactory arrangements for this purpose between the United Nations and the International Labour Organisation the Governing Body has taken no action on the basis of the provision. . . .’

² Article 37 (ii) of the Constitution of the I.L.O.

³ *I.L.O. Official Bulletin*, 3 (1921), p. 383.

⁴ The opinions of the Labour Office are published in the Organization’s *Official Bulletin*.

In 1921 the Director-General in his Report to the Conference, adverting to the unofficial character of these opinions, suggested that the Governing Body might have the necessary authority to give official interpretations:

'A third class of difficulties has arisen from the texts adopted by the Conference. Before ratifying, certain States have wished to know exactly to what degree such or such a clause of a Convention might bind them, or to what extent their existing legislation met the provisions of the Convention. After serious study of the decisions of Washington and comparison with their code, these countries have in some cases asked the Office what interpretation it placed upon such or such a provision. The precise understanding of a particular term has been of importance not only in facilitating the drafting of Bills or other measures for the application of the decisions in question, but also at times in furnishing information as to the exact effects which these might have upon the economic life of the country concerned. The Office is not competent to give official interpretations in these cases. It has considered itself, nevertheless, entitled to refer to precedents and to the preparatory studies, and to cite the example of other countries and thus to further, so far as lies within its power, the adherence of States to the Conventions. It may be useful in this connection, as is indicated below in connection with the question raised by the British Government with regard to the Hours Convention, to consider whether the Governing Body may not in fact have, in virtue of the Treaty of Peace, authority to give such interpretations officially. Ratification will be notably accelerated when the Governments can be sure of obtaining, from an admittedly competent authority, definitely clear interpretations and guarantees against arbitrary complaint. However that may be, the Office, whilst naturally making the fullest reservations as to the authority of the opinions it has given, has already replied to a certain number of enquiries of this type which have been made by various Governments.'¹

In 1924 the Labour Office (with the approval of a number of governments) again advanced the view that interpretation by the Governing Body in non-contentious cases could be justified and emphasized that the Governing Body was already constitutionally entitled to give interpretations with regard to complaints and representations.² However, the Belgian Government objected and suggested that the task of interpretation should be undertaken by the Conference.³ In fact, neither the Conference⁴ nor the Governing Body assumed this role and the Labour Office continued⁵ and still continues to

¹ *Proceedings of the International Labour Conference*, 3rd Session (1921), Report of the Director, p. 57.

² *Ibid.*, 6th Session (1924), Report on Amendment, p. 77.

³ Cf. *ibid.*, p. 80.

⁴ The Conference would be altogether too large and cumbersome a body to undertake such a task.

⁵ Jenks, 'The Interpretation of International Labour Conventions by the International Labour Office', this *Year Book*, 20 (1939), pp. 132-41. See also Minutes of the 9th Session of the Governing Body of the International Labour Office, pp. 365-6: 'More recently it has happened that the same point of interpretation has been raised by more than one member of the Organisation. In these cases the Office has been able to point out that when the point was previously raised and it was consulted thereon, the information supplied by it and the conclusion to which it appeared to lead had been accepted by the member in question and had given rise to no objection after publication in the Official Bulletin. The process of the development of international law is in fact an exactly similar process and the tacit acceptance of an interpretation acted on by a Member and communicated through the Official Bulletin constitutes important authority which can always be invoked for that interpretation.'

give an unofficial opinion on points of interpretation. By 1927 the practice was already well established together with the principles on which it would be exercised:

'The Governing Body has, in fact, already on several occasions declined to give interpretations of clauses of the Washington Hours Convention, and it is I think, most improbable that it will now go back on these previous decisions. . . . There exists, however, another procedure, the adoption of which might help to solve the difficulties encountered by the Netherlands Government. As you will certainly be aware, the International Labour Office has frequently been consulted both by Governments and by private organisations or individuals in regard to the meaning of particular provisions of the Conventions and Recommendations adopted by the International Labour Conference. The Office has always felt bound to reply to such requests although in doing so it has always pointed out that the Peace Treaty did not confer upon it any special competence in regard to interpretations and that its observations were therefore submitted subject to that express reservation. The Office has nevertheless been in a position to give opinions based more particularly on an examination of the documents of the Conference and of the action taken in similar cases by the various Governments. These opinions have, in some cases, been published in the Official Bulletin and no objection or protest has hitherto been lodged against them. This procedure may therefore be regarded as founded on a practice which has been recognized for a considerable time and you may perhaps think fit to utilise it in this particular case.'¹

A certain measure of official sanction was given to this practice as early as 1932 when the Governing Body approved the recommendations of the Standing Orders Committee to the effect that no change should be made in the procedure concerning the unofficial interpretation of Conventions by the International Labour Office.²

The practice, which makes the Labour Office the principal authority for determining the meaning of a doubtful term in a convention or recommendation, may at first sight invite criticism. First, it may be urged that the unofficial opinions submitted by the Labour Office are merely of persuasive value and that the International Court of Justice remains the exclusive body for giving a binding interpretation of labour conventions.³ The tentative nature of the opinions offered by the Labour Office may be seen from statements made by the Office itself, to the effect that it conceived its role to be merely to 'collect all the information which might help to determine a definite interpretation';⁴ 'to furnish every explanation as to the real sense of these texts, and, when there is room for doubt, to give an interpretation by making use of every indication which may help';⁵ 'to provide requesting governments with certain indications designed to facilitate an appreciation of the effect of particular provisions of a

¹ *I.L.O. Official Bulletin*, 12 (1927), p. 37.

² *Ibid.* 17 (1932), p. 156; see also *ibid.*, 12 (1927), p. 38.

³ *International Labour Code* (1951), vol. 1, p. cviii.

⁴ *I.L.O. Official Bulletin*, 5 (1922), pp. 52-61.

⁵ *Ibid.*, 3 (1921), p. 383.

Convention';¹ and to offer observations which may '... be of assistance in evaluating the view the International Labour Conference may take'.² On the other hand, it is a fact that the Labour Office, an official organ of the Organization, has been giving such opinions for more than forty years; that it has given nearly one hundred such opinions; that the Governing Body has approved the practice;³ that the opinions are published in both the *Official Bulletin*⁴ of the Organization and in the Minutes of the Governing Body;⁵ that an opinion once given has never been controverted⁶ and determines the interpretation to be given to a phrase if it is then used in a subsequent convention.⁷ In this manner, continuous practice has served to canonize opinions of the Labour Office and accord them the authority and influence, if not the dignity, title and form, of 'official' opinions.

A second drawback lies in the unwillingness of the Labour Office to render an opinion on a contentious issue:

'Up to the present the International Labour Office has never been called upon to express an opinion on a matter in which the Governments of two States Members have adopted divergent interpretations of the exact meaning of a convention which they have both ratified, and I am certain that you will agree with me in considering that in such circumstances it can only abstain from giving its views.'⁸

No doubt the Labour Office, sensitive to the fact that its authority in this matter is based on constitutional practice rather than the constitution itself, is anxious to avoid the possibility of a direct challenge to its credentials to

¹ *I.L.O. Official Bulletin*, 42 (1959), p. 386.

² *Ibid.*, 33 (1950), p. 305. See also *ibid.*, 25 (1940-4), p. 269: 'The following observations are submitted in the hope that they may be of service to your Government in deciding whether or not to ratify the Convention . . .'; *ibid.*, 45 (1962), p. 242: the Office must '... confine itself to providing requesting Governments with any indications which will clarify the meaning of particular provisions of the Convention . . .'; *ibid.*, 43 (1960), p. 568: the Office must 'confine itself to providing such information as may enable the Government in question to arrive at a decision'; *ibid.*, 3 (1921), p. 383: the Office may be '... able frequently to assist Governments in the elucidation of doubtful points . . .'. See also *ibid.*, 43 (1960), p. 573, and 45 (1962), p. 231: 'However the International Labour Office may be in a position to provide some elements of information which may be of assistance to the Government concerned in reaching a conclusion.'

³ See above, p. 89.

⁴ See, for example, Interpretation of the Decisions of the Conference, *I.L.O. Official Bulletin*, 3 (1921), p. 383.

⁵ See for example, *Minutes of the Governing Body of the I.L.O.* (1964), Report of the Director-General, (Interpretation of Decisions of the International Labour Conference): 'At the 155th Session of the Governing Body (June 1963), the Director-General submitted, for information, the texts of memoranda in which he had replied to requests made by governments concerning the interpretation of international labour conventions. The Director-General has since then replied to other requests of the same kind, making the usual reservation that the Constitution of the I.L.O. does not contain any provision authorizing him to interpret the Conventions adopted by the International Labour Conference. The texts of these replies, which are appended, are submitted to the Governing Body for information.'

⁶ At least on the merits of the opinion itself.

⁷ *I.L.O. Official Bulletin*, 23 (1938), p. 32; and Jenks, 'The Interpretation of International Labour Conventions by the International Labour Office,' *this Year Book*, 20 (1939), pp. 132-41.

⁸ *I.L.O. Official Bulletin*, 35 (1952), p. 347.

interpret labour conventions. So far it has refused to give an opinion in only two or three cases.¹ For similar reasons, the Office is also reluctant to express an opinion as to whether or not the legislation of a State is in conformity with the provisions of a convention;² for this task is discharged by the Committee of Experts. Nor is it the practice of the Labour Office to give opinions on the Freedom of Association Conventions, in view of the existence of special procedures for these Conventions.

Finally, the actual principles of interpretation applied by the Labour Office also reflect this attitude of extreme caution and determination not to arrogate to itself too authoritative a role. The Labour Office has been content merely to emphasize those principles of interpretation, such as the practice of various States and the use of preparatory work, of which the Office itself has exceptional and special knowledge, by virtue of the important role it plays in drafting conventions and invigilating their implementation: 'All that the Office can do is to endeavour to elucidate the meaning of these provisions by the study of the texts, the proceedings which led to the adoption of the conventions and the practice of other States.'³ We may now examine these various principles in more detail.

(a) *Preparatory work.* Recourse to preparatory work as a means of interpretation has long been controversial. Condemned in theory but resurrected and applied in practice by the Permanent Court⁴ and International Court of Justice,⁵ ignored altogether by the Court of the European Communities,⁶ it has received a most generous measure of recognition by the Labour Office. While the International Court usually invokes preparatory work as a subsidiary principle of interpretation to fortify a conclusion already reached,⁷ the Labour Office has relied on it, in a large number of cases, as a substantive method of interpretation.

On the only occasion when the Permanent Court of International Justice interpreted an international labour convention it did admittedly invoke the preparatory work, but merely as a subsidiary means of interpretation: 'The preparatory work thus confirms the conclusion reached on a study of the text of the Convention that there is no good reason for interpreting

¹ Ibid.; and see *ibid.*, 3 (1921), p. 17, and 13 (1928), p. 27.

² Ibid., 45 (1962), p. 242: 'In general it is not for the International Labour Office to express an opinion as to whether or not the legislation of a State is in conformity with the provisions of the Convention. . . . It is for the Government concerned to assess the conformity of a country's national legislation and practice with the standards laid down in a particular international labour convention, subject, in the event of its ratifying the convention, to the procedure established by the International Labour Organization, for the international examination of reports relating to the application of ratified conventions.' See also *ibid.*, 43 (1960), p. 568.

³ Ibid., 13 (1928), p. 27.

⁴ See Lauterpacht, *The Development of International Law through the International Court of Justice* (1958), pp. 116-21.

⁵ Ibid., pp. 121-7.

⁶ See McMahon, 'The Court of the European Communities, Judicial Interpretation and International Organisation,' this *Year Book*, 37 (1961), pp. 320-1.

⁷ Lauterpacht, *op. cit.*, pp. 116-21.

Article 3 otherwise than in accordance with the natural meaning of the words.’¹ In contrast, the Labour Office would seem to derive its authority to interpret conventions from the fact that it is principally responsible for drafting the texts and directing the preparatory work:

‘Although the Treaty of Peace has not conferred on the International Labour Office any special authority as regards the interpretation of the text of the Draft Conventions and Recommendations adopted by the Conference, the Office is in a position to examine the records and documents of the meetings of the Conference and of its various Commissions and is thereby able frequently to assist Governments in the elucidation of doubtful points.’²

The most important of the preparatory documents in relation to a convention or recommendation is usually the report submitted to the Conference by the committee³ to which the Conference has referred for examination the drafts of conventions or recommendations prepared by the Labour Office. Such reports ‘. . . frequently contain information which is of great value for the interpretation, understanding and application of the provisions of the Conventions and Recommendations; they record understandings regarding the meaning to be attached to particular expressions; they explain the purpose for which particular provisions were introduced; they contain suggestions regarding the manner in which matters left to national discretion should be dealt with.’⁴ The emphasis to be given to the preparatory work was explicitly acknowledged by the Director of the International Labour Organization, as early as 1931, in reply to a question from the Belgian Government, when he stated: ‘In reply to your letter I must first of all remind you that the Treaties of Peace have not given the International Labour Office any special authority to interpret Conventions adopted by the International Labour Conference. The Office is, however, always at the disposal of Governments in order to supply them with the information which it possesses regarding the preparatory work and the discussions which preceded the adoption of Conventions.’⁵ The same view has also been expressed in a large number of opinions given by the Labour Office.⁶

¹ *Interpretation of the Convention of 1919 Concerning the Employment of Women During the Night*, P.C.I.J., Series A/B, No. 50, pp. 378–80.

² *I.L.O. Official Bulletin*, 3 (1921), p. 383.

³ *International Labour Code* (1951), vol. 1, p. cix.

⁴ *Ibid.*, p. cx.

⁵ *I.L.O. Official Bulletin*, 16 (1931), pp. 31–2.

⁶ *Ibid.*, 45 (1962), p. 231: ‘No country has yet made use of Article 9 when ratifying the Convention. Recourse must therefore be had primarily to the preparatory work on the Convention.’ *Ibid.*, p. 242: ‘The Office must . . . confine itself to providing requesting governments with any indications which will clarify the meaning of particular provisions of the Convention, taking into account any elements emerging from the preparatory work leading up to the Convention.’ *Ibid.*, 3 (1921), p. 388: ‘I am replying in detail to the different questions you put to me on this subject, basing my answers not only on the Draft Convention itself but also on the discussions which took place in the Conference, the preparatory work of the Organising Committee and the decisions of the Commission on the Hours of Labour.’ See also *ibid.*, 45 (1962), p. 232, and 34 (1951), p. 258.

The faithful manner in which the Labour Office has adhered to this guiding principle may be illustrated by reference to the fact that in approximately seventy-three¹ of the ninety-six opinions so far given by the Labour Office, substantial reliance has been placed on the use of preparatory work as a means of interpretation. An extensive variety of preparatory documents have been adverted to including the reports and draft conventions and recommendations of the Labour Office,² the report of the Conference Committee on these drafts,³ the discussion in the Conference itself,⁴ opinions of the Governing Body,⁵ the views of experts who drafted the convention,⁶ the comments of individual governments,⁷ the postures adopted at a preliminary technical conference⁸ and the questionnaire and analysis of replies compiled by the Labour Office.⁹

On a number of occasions, an exhaustive survey is made of the whole legislative history of a convention, reference being made to four or five of the above preparatory documents.¹⁰ Often the preparatory documents are resorted to after an analysis of the text and in conjunction with two or three other principles such as the manner in which States have subsequently interpreted a particular provision in practice, or a comparison is made between several conventions, adopted at the same time, each of which contains a similar expression.¹¹

The unusual primacy enjoyed by preparatory work in the opinions given by the Labour Office may be accounted for by three reasons. First, the exceptionally thorough and detailed nature of the preparatory work before a convention is drafted, ensuring that each of its provisions has been subjected to intensive scrutiny and discussion prior to adoption means that there exists an extensive repertory on which to draw to ascertain the meaning it was agreed to ascribe to a particular term.¹² Secondly, as much of the preparatory work and drafting is done by the Labour Office itself, it is in a better position than any other body to interpret a provision by reference to the preparatory work.¹² Thirdly, as the opinions of the Labour Office

¹ Ibid., 47 (1964), p. 394; 46 (1963), pp. 466-70; 45 (1962), pp. 225, 227-35, 240-8; 43 (1960), pp. 572-3, 576-8; 42 (1959), pp. 374-83, 386-8, 390, 396, 398; 41 (1958), pp. 596-7, 599, 600-2; 40 (1957), pp. 473, 475, 482-3; 39 (1956), pp. 693-4, 697, 700; 38 (1955), pp. 370, 372, 375, 378, 381, 383, 385; 37 (1954), pp. 386-95; 36 (1953), pp. 269-70; 35 (1952), pp. 345-6, 352-4; 34 (1951), pp. 252, 255, 258-9; 33 (1950), pp. 305, 308-10; 32 (1949), p. 402; 31 (1948), pp. 258, 262-3; 30 (1947), pp. 384, 386-7; 29 (1946), pp. 494-8; 25 (1940-4), p. 272; 23 (1938), p. 32; 18 (1933), p. 24; 16 (1931), p. 32; 15 (1930), pp. 32, 35, 37, 151-2, 155; 14 (1929), pp. 62-3, 66; 13 (1928), pp. 20, 26, 28-31, 72-3, 77; 3 (1921), pp. 388, 396-7, 497, 675-6.

² Ibid., 46 (1963), pp. 466-7; 45 (1962), pp. 233-48; 42 (1959), p. 390; 39 (1956), pp. 693-4.

³ Ibid., 46 (1963), pp. 466-70; 38 (1955), p. 383; 36 (1953), pp. 269-70; 16 (1931), p. 32; 38 (1950), pp. 309-10.

⁴ Ibid., 38 (1955), p. 375; 29 (1946), pp. 494-8.

⁵ Ibid., 42 (1959), p. 396.

⁶ Ibid., 15 (1930), p. 35.

⁷ Ibid., 43 (1960), pp. 576-8; 42 (1959), p. 383.

⁸ Ibid., 43 (1960), pp. 572-3.

⁹ Ibid., 34 (1951), p. 252; 40 (1957), pp. 482-3.

¹⁰ Ibid., 42 (1959), pp. 376-82; 3 (1921), p. 395.

¹¹ Ibid., 38 (1955), p. 385; 34 (1951), p. 246; 12 (1927), p. 159.

¹² See above, p. 62.

are unofficial the Office is extremely cautious and careful merely to offer an opinion by reference to information (such as the preparatory documents and practice of States) of which, owing to its position, the Office has exceptional knowledge.

(b) *The textual principle.* The point of departure of any process of interpretation must be the disputed or ambiguous text. However, the fact that a State is uncertain of the exact meaning to be attributed to a particular text usually means that other principles of interpretation must be invoked to resolve the ambiguity. It is for this reason that the opinions of the Labour Office often begin with, even if they do not rely exclusively upon, an analysis of the text. For example, when considering the Sickness Insurance (Industry) Convention, 1927 (No. 24), and the Sickness Insurance (Agriculture) Convention, 1927 (No. 25), the Labour Office stated:

'The language of Article 3, paragraph 3 (c), of the Conventions, particularly in the English text, implies a physical departure from one phase to another. The French text (*se soustrait . . . au contrôle*) which is equally authoritative, does not convey this idea to quite the same extent, but also implies that it is the person of the insured that is withdrawn from the supervision of the insurance institution. Moreover, the English text of the whole sub-paragraph makes it appear that the limitation applies only if the insured person removes himself "while ill". All this suggests that something more than failure to give pertinent information is required by the text for the refusal or reduction of benefits.'¹

It may be noted that one of the main purposes of scrutinizing language in a bilingual text will often be to determine whether the language which is not that used by the government raising the question throws any light on the issue. Many other illustrations could be given of the textual principles of interpretation,² including one from the jurisprudence of the Permanent Court of International Justice.³

The Labour Office also applies the usual rule that, in the absence of any indication to the contrary, a word is to be understood according to its plain ordinary meaning: 'The ordinary meaning of the expression is, however, reasonably clear. Etymologically the term 'estuary' is consistently defined in the standard dictionaries as including only tidal waters, and the French term '*estuaire*' while perhaps rather wider, does not appear to have any substantially different meaning.'⁴ As one might expect, therefore, the

¹ I.L.O. *Official Bulletin*, 45 (1962), p. 229.

² Ibid., 17 (1932), p. 42: 'I should supplement this opinion, which is based entirely on the actual terms of Article 1 of the Convention, by information on the application of the Convention in the countries which have it.' And see *ibid.*, 46 (1963), p. 467; 43 (1960), p. 566; 42 (1959), p. 378; 37 (1954), p. 389; 10 (1928), pp. 19-20.

³ *Interpretation of the Convention of 1919 Concerning the Employment of Women During the Night*, P.C.I.J. Series A/B, No. 50, pp. 373-8.

⁴ I.L.O. *Official Bulletin*, 29 (1946), p. 493.

Labour Office, apart from stating its intention to interpret a provision by reference to the text, has regularly done so in practice and often explicitly bases its conclusion on an examination of the text.

(c) *Subsequent practice.* This principle of interpretation is one of increasing importance within an international organization, particularly when a question arises concerning interpretation of its constituent instrument. Recent decisions of the International Court of Justice¹ and reports of the International Law Commission² reflect and confirm this tendency. Its use by the Labour Office has been well established for nearly forty years³ and, together with the textual principle and the use of preparatory work, it is invoked more frequently by the Labour Office than any other principle. One reason is that the Labour Office maintains a repertory of practice and is in a better position than any other body to ascertain the practice in the various countries.⁴ A second reason is the desirability of maintaining uniformity of interpretation in the practice of the States applying a convention.⁵ Therefore reference to the practice in applying a convention is not infrequent: 'The indications which the Office finds it possible to furnish in reply to questions of the kind are drawn either from the work of the Conference in connection with the drafting of the Convention and Recommendation or from the established practice in countries which are already applying them.'⁶

For example, in connection with the Social Security (Minimum Standards) Convention 1959 (No. 102), the Office stated: 'Of the countries which have so far ratified the Convention in respect of Part X, two (Greece and Mexico) apparently have no age limit; one (Israel) has fixed the limit at 40 years; two (Federal Republic of Germany and Yugoslavia) have fixed the limit at 45 years; and one (United Kingdom) has fixed the limit at 50 years. No observations have been made on the subject by the Committee of Experts in respect of these countries.'⁷ This reference to the Committee of Experts is important, as their views are frequently cited as the machinery principally responsible for ensuring that States implement fully in practice the obligations they have assumed by ratifying a convention.⁸

The practice of States which have ratified a convention is sometimes referred to in order to reassure a State which is unwilling to ratify because

¹ See the Advisory Opinion *Concerning Certain Expenses of the United Nations*, I.C.J. Reports, 1962.

² *Report of the International Law Commission* (1964).

³ I.L.O. *Official Bulletin*, 14 (1929), pp. 59-62.

⁴ Through the system of annual reports.

⁵ See *Minutes of 55th Session of the Governing Body of the I.L.O.* (1931), p. 181, and *Minutes of the 64th Session* (1933), p. 451.

⁶ I.L.O. *Official Bulletin*, 12 (1927), p. 159.

⁷ *Ibid.*, 45 (1962), p. 240.

⁸ *Ibid.*, pp. 233, 239; 43 (1960), p. 567; 42 (1959), pp. 376, 382; 40 (1957), p. 483; 38 (1955), p. 383.

it is uncertain of the interpretation to be given to a particular provision: 'In fact, the reading given to the Convention up to the present by certain States which have ratified it appears to agree with that elaborated above, and this point may usefully be emphasised since it seems fully to dispose of the apprehensions felt by the Netherlands Government.'¹ On a number of occasions Governments have requested the Labour Office to advise them of the manner in which other States have interpreted a convention in practice. So, the Luxemburg Government in a letter to the Director of the Labour Office stated: 'It seems to me necessary however, in order to solve the difficulty, to learn the manner in which confectioneries are dealt with by the other States Members of the International Labour Organisation which have satisfied the Hours Convention, so as to ensure uniformity in its application.'²

Again in relation to the Convention concerning the Employment of Women before and after Childbirth, the Labour Office noted that:

'... some of the States which have ratified the Convention have had recourse for the payment of benefit to their general sickness and maternity insurance systems, which include a maximum salary limit for eligibility for insurance benefit. This limit applies to manual and non-manual women workers in Chile (8,000 pesos), Spain (4,000 pesetas) and Luxemburg (10,000 francs) and to non-manual women workers only in Germany (3,600 marks) and Hungary (3,600 pengoes). The enforcement of the Convention in these States has up till now called forth no comment from the Conference, to which the reports communicated by the States on the application of the Conventions which they have ratified, in accordance with Article 408 of the Treaty of Versailles, are regularly submitted.'³

(d) *Comparison with other conventions.* The Court of Justice of the European Communities occasionally interprets a provision by reference to its meaning in other treaties adopted at the same time.⁴ The Permanent Court also invoked this principle in interpreting a labour convention:

'The similarity both in structure and in expression between the various draft Conventions adopted by the Labour Conference at Washington in 1919 leads the Court to attach some importance to the presence in one of the other Conventions of a specific exception that the provisions of that Convention should not apply to persons holding positions of supervision or management, nor to persons employed in a confidential capacity.'⁵

The same principle has been applied on numerous occasions by the Labour

¹ *I.L.O. Official Bulletin*, 12 (1927), p. 94.

² *Ibid.*, 14 (1929), p. 58.

³ *Ibid.*, 15 (1930), p. 33. Other examples where the Labour Office has invoked the principle of subsequent practice may also be cited: *ibid.*, 41 (1958), p. 597; 35 (1952), pp. 252, 349; 30 (1947), p. 384; 17 (1932), p. 41.

⁴ See McMahon, 'The Court of the European Communities; Judicial Interpretation and International Organisation,' *this Year Book*, 37 (1961), p. 320.

⁵ *Interpretation of the Convention of 1919 Concerning the Employment of Women During the Night*, P.C.I.J., Series A/B, No. 50, pp. 380-1.

Office:¹ 'It should be noted that the same expression ("assimilated periods") was used in the Maintenance of Migrants' Pension Rights Convention, 1935 (No. 48), (Article 2, paragraph 5). The preparatory work of this convention indicates that periods "assimilated" to contribution periods were understood to be periods in respect of which no payment was made. . . .'² And in another context the Office said: "The Night Work (Women) Convention (Revised), 1948 (No. 89), and the Night Work of Young Persons (Industry) Convention (Revised), 1948 (No. 90), contain provisions corresponding to those in the Conventions adopted in 1919, which were the subject of the Italian Government's request. The considerations set forth in this memorandum are therefore equally valid for the revised Conventions of 1948.'³

(e) *The teleological principle.* Sometimes reference is made to the purpose and objective of a convention and an ambiguous term interpreted in such a manner that the purpose of the convention will be advanced rather than obstructed: 'In this connection it should be emphasised that the Convention was primarily intended to ensure maternity protection for female workers. This protection is accompanied by measures intended to prevent employers from employing less female labour on account of the protective measures provided for. It is for this reason that certain provisions have been inserted in Article 4.'⁴ And on another occasion the Labour Office said: 'Consideration of the general approach adopted in the Social Security (Minimum Standards) Convention 1952, leads to the same conclusion. The Convention was framed so as to permit limitation of the obligations which it lays down to the contingencies specified by a Member, and it would seem a contradiction of this fundamental principle of the application if the Convention were to impose obligations of a general nature. . . .'⁵

However, references to the purpose or object of a convention are on the whole meagre.⁶

(f) *Municipal law.* On one or two occasions the Labour Office has stated that the meaning of a term is to be ascertained by examining the meaning it has been given in the municipal law of the various States.⁷ 'As a general rule the meaning of a concept such as "wilful misconduct", even when it figures in an international instrument must be given the meaning assigned to it in the national law of the country concerned. . . .'⁸ This method was also applied in another case where the Labour Office said: 'It is therefore necessary to seek an explanation of the term "polygraphic

¹ I.L.O. *Official Bulletin*, 46 (1963), p. 200; 45 (1962), pp. 244, 575; 39 (1956), p. 697; 38 (1955), pp. 378-81; 35 (1952), p. 248.

² Ibid., 46 (1963), pp. 467-70.

⁴ Ibid., 42 (1959), p. 388.

⁶ Ibid., pp. 234, 238; 43 (1960), p. 567; 41 (1958), p. 602; 30 (1947), pp. 382, 387.

⁷ Ibid., 40 (1957), p. 428.

³ Ibid., 33 (1950), p. 200.

⁵ Ibid., 45 (1962), p. 242.

⁸ Ibid., 45 (1962), p. 228.

industries" in various national regulations. In many countries only the term "polygraphic industries" without further details, appears in the list of trades, industries or processes contained in the legislative texts or regulations relating to compensation for industrial accidents. This is particularly the case in Brazil, Cuba, Egypt, Hungary, Luxemburg, Roumania, Spain and Uruguay. . . .'¹

Under no circumstances, however, will the Office attempt to pass judgment on the conformity of internal legislation with the provisions of an international labour convention.²

(g) *Context.* Another well-established principle of interpretation, the interpretation of a provision by reference to the context in which it is placed in a convention, is also occasionally referred to by the Labour Office:

'It appears that paragraph 8 of Article 4 of the Convention, to which the Government specifically refers in its request, cannot be considered apart from the other paragraphs of that Article, which read as follows: . . .'³

However, this principle is seldom invoked specifically by the Office.⁴

(h) *Previous opinions.* The Labour Office, like any judicial tribunal, seeks to preserve continuity and cohesion in its jurisprudence. Requested to give an opinion on a question on which it has already pronounced, it will usually refer the requesting State to its previous opinion:

'Substantially the same question was submitted for an opinion to the International Labour Office in 1931 by the Polish Government with reference to Article 10 of the Hours of Work (Commerce and Offices) Convention, 1930. . . . On that occasion the International Labour Office advised as follows: . . . The reasoning relied upon by the International Labour Office in the above opinion appears to be equally applicable to the present case. . . .'⁵

On another occasion, when the French Government quoted a previous opinion of the Office in support of a particular interpretation, the Labour Office in its reply was careful to indicate that the previous opinion was in answer to a very different question from the present request.⁶

In short, the Labour Office consistently follows and adheres to its previous jurisprudence⁷ and when it may appear to be departing from a previous position, is usually careful to point out that it is being asked to advise on a different question. Moreover, it invokes a presumption in favour of the correctness of its earlier opinions:

¹ *I.L.O. Official Bulletin*, 38 (1955), pp. 372-3.

² *Ibid.*, 45 (1962), pp. 242, 568, 575-6; 41 (1958), p. 597.

³ *Ibid.*, 42 (1959), p. 385.

⁴ *Ibid.*, 45 (1962), pp. 232, 240; 23 (1938), p. 123.

⁵ *Ibid.*, pp. 30-1.

⁶ *Ibid.*, 17 (1932), pp. 41-2.

⁷ *Ibid.*, 40 (1957), p. 474: 'The Office has on two previous occasions advised as to the meaning of the expressions used in Article 2, paragraph 1, of the Convention, in reply to requests from the Governments of Switzerland and the Netherlands. A copy of the correspondence between the said Governments and the Office, as published in the Official Bulletin, is appended hereto.' See also *ibid.* 38 (1955), pp. 320-1, 385; 18 (1933), p. 24.

‘... when an opinion given by the Office has been submitted to the Governing Body and published in the Official Journal and has met with no adverse comment, the Conference must, in the event of its subsequently including in another Convention a provision identical with or equivalent to the provision which has been interpreted by the Office, be presumed, in the absence of any evidence to the contrary, to have intended that provision to be understood in the manner in which the Office has interpreted it.’¹

In this manner, the Labour Office seeks to impart to its opinions a greater measure of authority, the basis of which lies solely in its own unilateral pronouncement and the tacit acquiescence and acceptance of that pronouncement by the member States.

(i) *Conclusion.* Consistent practice described above now appears to have established that the Labour Office is the principal organ for rendering an advisory opinion concerning the interpretation of an ambiguous provision embodied in a labour convention or recommendation. The justification for and strength of the position of the Labour Office lies in the fact that over a period of more than forty years it has given nearly one hundred opinions none of which has ever been challenged on the merits. Its title to do so is therefore part of the constitutional usage of the Organization and the formal provisions of the Constitution relating to the competence of the International Court in this matter have only been invoked on one occasion² while the explicit provision in the constitution providing for the establishment of a tribunal has remained inert.³ Suggestions that the Governing Body or the Conference of the Organization should be empowered to give an authoritative interpretation have not been adopted;⁴ in fact both bodies would be most unsuitable for such a task as they are much too cumbersome in structure and political in character to undertake an essentially legal function. Therefore, apart from the municipal courts of the member States,⁵ the Labour Office remains the principal, if unofficial, body for interpreting conventions and recommendations.

The limitations of the procedure have already been adumbrated above.⁶ It does not provide for an authoritative or binding interpretation; in contentious cases the Labour Office refuses to give an opinion; it is severely circumscribed concerning the principles of interpretation it may apply; and

¹ Ibid., 23 (1938), p. 32.

² See above, p. 86.

³ See above, p. 87.

⁴ See above, pp. 88–9.

⁵ See *International Labour Code* (1951), vol. 1, p. cviii: ‘Questions relating to the interpretation of international labour conventions are also liable to arise in proceedings before municipal courts. In such cases these questions normally arise incidentally to the consideration of the national laws or regulations implementing the provisions of the relevant Convention, and the bearing of the decision given upon the interpretation of the convention as an international instrument is often slight.’ See also *International Survey of Legal Decisions on Labour Law*.

⁶ See above, pp. 89–91.

it places extensive reliance on the use of preparatory work, a principle deprecated by a number of judicial tribunals.¹

On the other hand, the strict adherence of the Labour Office to these limitations has proved to be the basic strength of the system. Paradoxically, it is precisely because the Labour Office has claimed so little that it has achieved so much. By making such modest claims for its opinions, the Labour Office deflects any possible challenges of its constitutional power to give them at all. As a consequence its unquestioned practice over a long period has given its opinions such great authority that now there is little likelihood that they will ever be disregarded. The Labour Office has assisted this process by restricting its opinions to a concise and practical Memorandum, by developing a body and repertory of jurisprudence, by taking care never to give an opinion which would be inconsistent with a previous opinion, by quoting from its previous opinions and by acting on the presumption that an opinion determines the meaning of a provision if the same provision is contained in a subsequent convention.² The value of its opinions lies, first, in ensuring uniformity of interpretation³ and application in the various countries; and, secondly, in the fact that by satisfying States concerning the interpretation of an ambiguous provision, an opinion frequently removes obstacles inhibiting ratification. In this manner the system plays an important part in facilitating the ratification of labour conventions.⁴

The Director of the Organization, addressing the Permanent Court, noted that in interpreting conventions the International Labour Office had always attempted to be guided by two principles: (1) That of not stretching the scope of a convention beyond the limits set by the text and by common sense; and (2) that of taking care not to diminish, by admitting unnecessary qualifications, the benefits which the workers are entitled to expect the convention to secure for them.⁵ Occasionally one may find an explicit rejection by the Labour Office of too strict an interpretation:

'In these circumstances it would be difficult to accept an unduly strict interpretation of Article 8 (b) of the Convention which would have the effect, *inter alia*, of impeding the proper functioning of first-aid services, such as are provided for in the Protection of Workers Health Recommendation, 1953 (No. 97).'⁶

¹ See Lauterpacht, *Development of International Law through the International Court of Justice* (1958), pp. 116-41.

² See above, p. 98.

³ *I.L.O. Official Bulletin*, 5 (1922), p. 59: 'It is of the highest importance for the application of the Convention to this branch of industry that the Governments of countries which consider it upon a large scale should agree upon one and the same interpretation.'

⁴ *Ibid.*, 45 (1962), p. 226; 40 (1957), p. 476; 13 (1928), pp. 72-3.

⁵ *Interpretation of the Convention of 1919 concerning the Employment of Women During the Night, P.C.I.J. Series A/B, No. 50.*

⁶ *I.L.O. Official Bulletin*, 40 (1957), p. 478; 39 (1956), p. 700; see also *ibid.*, 15 (1930), p. 152.

So also the Labour Office has said:

'A restrictive interpretation of the term "ship-owner" would produce the illogical and unwarranted result of making these provisions inapplicable in cases where seafarers were in the employment of persons other than the owner of the ship.'¹

In short the Labour Office has adopted an effective and liberal attitude when interpreting conventions.²

Accordingly, it may fairly be said that the system operating within the International Labour Organization for the interpretation of labour standards is remarkable in two respects: first, it is unusual in the machinery employed, namely the Secretariat of the Organization, and in the latter's assumption of the role of interpreter on the basis of a constitutional practice, not of a formal provision of the Constitution; secondly, the principles of interpretation applied are unusual in that such extensive emphasis is placed on recourse to preparatory documents. Of course one may discover a direct relationship between the fact that the Labour Office gives 'unofficial guidance' and the fact that the rules of interpretation applied are not, in emphasis, the same as those which would be applied in a court of law. As the opinions are unofficial it is not surprising that the office is guided more by factual historical materials than by considerations of principle which might be open to debate.

At the beginning of this chapter it was noted that, under Article 37 of the Constitution, full compulsory jurisdiction for all matters of interpretation is vested in the International Court. This jurisdiction exists in relation to all members of the Organization, and in 1953, when the Soviet Union wished to enter the Organization with a reservation in respect of this jurisdiction, the reservation was not permitted.³ It may be submitted that it is in large measure because such compulsory jurisdiction exists that it has only once been necessary to have recourse to it in practice and the interpretations given by the Labour Office are accepted primarily because the alternative is to go to the Court.

CONCLUSION

With the adoption, by the International Labour Conference, of 126 conventions and 127 recommendations, there is now in existence a substantial international labour code. It consists of a complex, detailed and

¹ Ibid., 40 (1957), p. 478.

² Ibid., 12 (1927), p. 161: 'It would seem logical, however, to give to the broad and comprehensive expression in the Recommendation a broad and comprehensive interpretation. If in such undertakings as printing works and rubber works the melting processes were on a scale comparable to those carried on in the undertakings specially destined for those processes, there would be strong grounds for regulation in the spirit of the Recommendation.'

³ The Soviet Union joined the League of Nations (and so became a member of the I.L.O.) in 1934; was expelled from the League in 1939; and rejoined the I.L.O. in 1954. See *I.L.O. Official Bulletin*, 37 (1954), pp. 230-1.

extensive body of internationally approved standards and some of these standards, when ratified, give rise to international obligations.

Under Article 19 of the Constitution, member States are obliged to submit conventions and recommendations to the relevant national authority and to notify the Director-General of the steps taken to implement instruments which have been submitted. The application of conventions, both ratified and unratified, and recommendations, is then supervised by a comprehensive and recurrent Reports procedure. These legislative techniques are occasionally supplemented by the adoption of less formal instruments in the shape of resolutions either as a precursor to a convention or in cases where the adoption of a convention or recommendation would not be suitable.

A number of extraordinary legal characteristics of these legislative techniques have also been noted; their tripartite nature, the flexibility devices incorporated in conventions, the machinery for revision, the durability of conventions in relation to State succession and withdrawal from the Organization, the practice of not permitting reservations to conventions and the machinery and principles for interpreting international labour conventions.

SECURITY COUNCIL RESOLUTIONS ON RHODESIA*

By J. E. S. FAWCETT
Fellow of All Souls College, Oxford

I

THE resolutions adopted by the Security Council since May 1965 on the situation in Rhodesia raise, among other things, issues of the nature of domestic jurisdiction and of the application of Chapter VII of the United Nations Charter. After a sketch of their legal background, an attempt will be made here to answer three questions about these resolutions: Were any matters in the Rhodesian situation dealt with by them essentially within the domestic jurisdiction of a State? Was the Rhodesian situation a threat to the peace? Can the Security Council, by a resolution not governed by Article 25, empower or authorize a member to take action otherwise unlawful?

II

Rhodesia, settled under the wing of the British South Africa Company, had an unofficial majority on its Legislative Council by 1920 and, having in a referendum rejected incorporation in South Africa, became a self-governing colony in 1923. The Governor was appointed on the advice of the Prime Minister of Rhodesia, and all officials were appointed by and responsible solely to the Southern Rhodesian Government.

Close British control of this largely self-sufficient country, land-locked and lying away from the imperial lines of bases and communications, was never either welcome or strongly asserted.² The reservation of bills for imperial assent, where they appeared to infringe African interests in the colony and later the Federation, led in no case to intervention by the United Kingdom Government or Parliament and so gave little protection.³

* © J. E. S. Fawcett, 1967.

¹ Properly, Southern Rhodesia until the dissolution of the Federation of Rhodesia and Nyasaland in 1963. For a legal survey of the position of the territory before 1923 see *In re Southern Rhodesia*, [1919] A.C. 211 P.C.; *British International Law Cases* vol. 1, p. 644, particularly at 240 (p. 658).

² See Dame Margery Perham, 'The Rhodesian Crisis: The Background', *International Affairs* (January 1966), pp. 1-13, at p. 5: '... In no place in the British Empire from North America through South Africa and Australia to New Zealand has the frontiersman not resented restraint from the imperial centre.'

³ The Lands Apportionment Acts 1936 and 1941 'allotted some 50,000 square miles to 2,630,000 Africans and 75,000 square miles, mostly the better land, to 215,000 Europeans', *ibid.*, p. 2. Compare the Federal Constitutional Amendment Bill and Electoral Bill, reserved as being, in the opinion of the African Affairs Board, 'differentiating measures' under Article 77 of the Federal

After the federation in 1953 of the Rhodesias and Nyasaland, there was a further evolution of self government on both the constitutional and the external side. In a Joint Declaration of the British and Federal Governments,¹ the constitutional 'convention' that the United Kingdom Parliament does not legislate for a self-governing colony without its consent, was declared operative for the Federation:

'The United Kingdom recognises the existence of a convention applicable to the present stage of the constitutional evolution of the Federation, whereby the United Kingdom in practice does not initiate any legislation to amend or repeal any Federal Act or to deal with any matter included within the competence of the Federal legislature except at the request of the Federal Government.'²

That this had been the position in Southern Rhodesia itself before the federation was made clear in 1961:³

'The constitution of 1923 conferred responsible government on Southern Rhodesia. Since then⁴ it has become an established convention for Parliament at Westminster not to legislate for Southern Rhodesia on matters within the competence of the Legislative Assembly of Southern Rhodesia, except with the agreement of the Southern Rhodesian Government.'⁵

The position was reaffirmed with some vehemence in the Security Council in September 1963 by the United Kingdom representative;

'The essential point, which I make with all possible emphasis, is that the freedom of the Southern Rhodesian Government to conduct its own internal affairs is no fiction but an inescapable constitutional and political fact. . . . A convention can, under our system, and generally does exist well before it reaches public recognition in Parliament. Amongst these conventions is one against the British Parliament legislating for the self-governing colonies without their consent.'⁶

These statements and the dispute over independence can, it seems, be rationalized only if a distinction is made between ordinary internal legislation in a self-governing colony and legislation of a fundamental or constituent character, that is to say, legislation which alters the status of the colony. So the secession of a state or province from a federated colony, or the dissolution of the federation itself, may be regarded as lying outside the Constitution. The United Kingdom Parliament recommended allowance of both Bills, an Opposition (Labour) motion to disallow the Constitution Amendment Bill being defeated 301-245. The Monckton Commission, reporting in 1960, found 'the [African Affairs] Board's prestige and usefulness seriously injured by this episode. In fact the powers of veto or disallowance have never been exercised over any Rhodesian bill since 1923.

¹ On 27 April 1957.

² Compare Statute of Westminster 1931, s. 4.

³ *Report of Central Africa Conference* (1961), Cmnd. 1399.

⁴ It is unclear whether the 'convention' is being described as established in 1923 or at an intermediate time.

⁵ A Rhodesian request that the 'convention' be embodied in legislation, on the lines of Statute of Westminster, s. 4, was, however, reported as being noted by the Secretary of State 'without commitment'; *Report of Central Africa Conference* (1961), n. 6 at § 34.

⁶ *Contemporary Survey* (1963-I), pp. 67-70.

reach of the 'convention'. The British Caribbean Federation was dissolved by the West Indies Act, 1962, not only not at the request of the Federal Government then in office, but against its declared will. Similarly, the Federation of Rhodesia and Nyasaland itself was dissolved on 31 December 1963, in face of strenuous opposition by the Federal Government. In this dissolution, described as 'an exercise of Britain's sovereign power',¹ the United Kingdom Parliament emphasized its authority by subjecting the Order-in-Council, made under the Act authorizing dissolution, to an affirmative resolution. The attempted secession of Western Australia from the Commonwealth of Australia in 1933-1934, supported by a plebiscite majority of two-to-one in favour but denied by a U.K. Parliamentary Select Committee, would be a true exception to the suggested principle only if the 'convention' were applicable to the Australian States.

It may be argued then that a bare legislative grant of independence by the United Kingdom Parliament is also 'an exercise of sovereign power', and could be enacted for a self-governing colony without its request or consent. But could it be accompanied by the required adoption of constitutional or other provisions, to which the government of the colony objected, if those provisions were to govern matters already within its legislative competence as protected by the 'convention'? The answer to this question is still perhaps, yes, at least where the 'convention' has not been given statutory form. In other words, a legislative statement of the 'convention' on the lines of Statute of Westminster, s. 4, is certainly politically, and perhaps also legally, irreversible; but so long at least as the 'convention' has not been given statutory form, the sovereign power of the United Kingdom Parliament prevails over it.

There was also in the Joint Declaration of 1957² a conscious enlargement of the international competence of the Federation. It was described by the Federal Prime Minister in the light of this declaration as comprising:

- 'the right to conduct all relations and to exchange representatives with Commonwealth countries without consultation with the United Kingdom Government;
- 'the right to conduct all negotiations and agreements with foreign countries subject to the need to safeguard the United Kingdom Government's international responsibilities;
- 'the right to appoint representatives to the diplomatic staffs of H.M. embassies;
- 'the right to appoint its own diplomatic agents, who will have full diplomatic status

¹ *Report of Central Africa Conference* (1963), Cmnd. 2093, § 21.

² See Joint Declaration of United Kingdom and Southern Rhodesia Governments (27 April 1957): 'The Federal Prime Minister represented that the time had come for the Federation to assume more responsibility . . . particularly in the field of relations with other countries and the appointment of representatives of the Federation in such countries. The United Kingdom Government have agreed to entrust responsibility for external affairs to the Federal Government to the fullest extent possible consistent with the responsibility which H.M. Government must continue to have in international law so long as the Federation is not a separate international entity.'

and who will be in charge of Federal missions, in any foreign countries prepared to accept them, and to receive such agents from other countries;

'the right, on its own authority, to acquire the membership of international organizations for which it is eligible.'

The first right is derived from the old *inter se* doctrine of Commonwealth relations, that the Commonwealth is a family where the children may be treated as of age,¹ before law and custom allows, and that their putting on the clothes of independence, and behaving like States, is harmless, for it is all a convention, outside the real world of international relations. Rhodesia exchanged High Commissioners with London² and Pretoria, and participated by special invitation in the Prime Ministers' Conferences.

Though some of the other rights, as enumerated by the Federal Prime Minister, are attributes of an independent State, neither the Federation, nor Rhodesia after the dissolution in 1963, exercised any of them to the fullest extent. The Federation concluded trade and customs agreements with the United Kingdom, South Africa, Australia, Canada, Bechuanaland (now Botswana), Israel and Portugal.³ But the international responsibilities of the United Kingdom appear to have been preserved, at this stage at least, by the limitation of the legislative competence of the Federal Assembly to implement treaties, conventions or agreements of the Federation to those concluded 'with the authority of H.M. Government in the United Kingdom'.⁴

There have long been representatives of the Federation, and after its dissolution of Rhodesia, in the British Embassies in Washington, Tokyo, Lisbon and Bonn, and Rhodesian consular representation in Mozambique. But the attempt of the Smith régime to appoint a Rhodesian representative in Lisbon, having independent diplomatic status, finally failed in face of the unwillingness of Portugal to go beyond entitling it a 'Rhodesian mission'.

Southern Rhodesia was an original contracting party to the General Agreement on Tariffs and Trade, but was comprised in the United Kingdom membership of the U.N., I.M.F., and I.B.R.D., and became a member of the British colonies group in the U.P.U. in July 1940. The Federation became an associate member, or the equivalent, of F.A.O. in 1959, the I.T.U. in 1960 and the Economic Commission for Africa in 1961.

¹ By a similar convention the Sultan of Johore, the Gaekwar of Baroda, the Government of Kelantan, and the Ruler of Bahawalpur State were treated in the English courts as foreign sovereigns: see particularly the Commonwealth Relations Office certificate in *Sayce v. Ameer Sadiq Abbasi*, [1952] 2 Q.B. 390 C.A. Their international status was doubtful.

² The responsible office in London was the Dominions Office until 1947, then the Commonwealth Relations Office, and the Central Africa Office after March 1962.

³ For the powers of the Federal Assembly to legislate on external relations and the implementation of treaties, see *Federation of Rhodesia and Nyasaland (Constitution) Order 1953*, Article 29, S.I. 1199/1953, Schedule II.

⁴ *Ibid.*, Article 29 (ii).

This record demonstrates on the one hand that, although conduct of their external relations was at many points entrusted to the Federation and to Southern Rhodesia by the United Kingdom, they did not thereby acquire the full capacity of independent States, or claim or receive any recognition as such;¹ but, on the other hand, that this result was to be attributed not to lack of qualification of Rhodesia to be an independent State, but to constitutional limitations accepted by it.

In the 1961 Constitution,² introduced at the request of Southern Rhodesia, constitutional links with the United Kingdom then controlling were further attenuated. Describing the status of Southern Rhodesia under the new constitution,³ the First Secretary of State observed that the remaining powers of the Crown were confined to 'those features of the Constitution affecting the position of the Sovereign and the Governor'⁴ and to the disallowance of legislation which appears inconsistent with the treaty obligations of the United Kingdom towards any country or international organization, or with undertakings in respect of loans under the Colonial Stock Acts. On the dissolution of the Federation on the last day of 1963,⁵ the legislative and executive powers of the Federal authorities were transferred to the former component territories, existing laws being maintained in force;⁶ and the Secretary of State for Commonwealth Relations stated that, on dissolution, the powers entrusted to Southern Rhodesia in the conduct of external affairs would be the same as those entrusted to the Federation, 'subject to the ultimate responsibility of H.M. Government for the external affairs of Southern Rhodesia'. After 1963 then, though United Kingdom responsibility and control was slight in law, and politically slighter, Rhodesia still did not claim to be an independent State; and, adding minatory words about rebellion, the British Government formally stated in 27 October 1964 that 'a mere declaration of independence would have no constitutional effect. The only way Southern Rhodesia can become a sovereign independent State is by an Act of the British Parliament . . . '.

¹ See, for example, the United Nations Secretariat Opinion of 21 September 1963 that the Federation was not a 'State': *U.N. Juridical Yearbook* (1963).

² Entered into force in November 1962.

³ *Hansard*, H.C. vol. 668, cols. 969-70 (3 December 1962).

⁴ The Southern Rhodesian legislature has power to amend all sections of the 1961 Constitution, except those relating to the Sovereign and Governor, but in the case of the 'entrenched provisions' (the Declaration of Rights; Privy Council appeals; the Constitutional Council; the judiciary; and the power of amendment itself) only by a special procedure. As regards the dissolution of the Assembly the Governor-General was subject to the same conventions as those operating in the United Kingdom: *Constitution*, s. 45 (1). The Assembly also has power to enact legislation having extraterritorial effect: *ibid.*, s. 20 (2).

⁵ S.I. 2085/1963.

⁶ S.I. 1635/1963.

III

The situation in Rhodesia had then already been for some time a preoccupation of the United Nations and, in particular, the Committee of 'twenty-four', established to implement General Assembly Resolution 1514-XV on colonialism.

The United Kingdom always maintained in the United Nations both that Southern Rhodesia was not a non-selfgoverning territory coming under Article 73 of the Charter,¹ and that Article 2 (7) forbade United Nations intervention in its affairs,² as being within the domestic jurisdiction of the United Kingdom. Moreover, the apparent conflict between these two positions was not resolved by description of the relationship between the United Kingdom and Southern Rhodesia as being 'something halfway between dependence and independence' or as 'not executive but primarily diplomatic in character'.³ The United Nations General Assembly became impatient with these constitutional anomalies and, declaring⁴ that Southern Rhodesia was to be regarded as a non-self-governing territory in the sense of Article 73, addressed a number of resolutions⁵ to the United Kingdom, as 'administering power', concerning constitutional and political developments in the territory.

The Committee of 'twenty-four' adopted in June 1964 a report of a sub-committee on Rhodesia, which had had discussions with United Kingdom Ministers in London, and drew the attention of the Security Council to it. The Committee continued to watch the situation and, in anticipation of the Rhodesian elections in May 1965, again brought the matter to the attention of the Security Council. The latter adopted a resolution on 6 May 1965,⁶ requesting all United Nations members to refuse acceptance of a

¹ It was not included in the list of non-selfgoverning territories contained in G.A. Resolution 64-1 (14 December 1946).

² For an extended survey of the position see the speech of the United Kingdom delegate (Mr. Godber) in the General Assembly plenary session which adopted Resolution 1755-XVIII, calling for the release from detention of Joshua Nkomo and other nationalist leaders and the lifting of the ban on the Zimbabwe African People's Union; *Contemporary Survey* (1962-II), pp. 248-53.

³ *Ibid.*, p. 250. The difficulty of drawing the line between self-government and independence is not peculiar to the Commonwealth. See *Bradford v. Chase National Bank*, [1938] United States S.D.N.Y.; *Annual Digest*, 1938-40, No. 17, immunity extended to Philippine Commonwealth in respect of bank balances in its possession, after 'suggestion' by the Secretary of War that: '5. The Government of the Philippine Islands constitutes and is a sovereign State and functions as such, recognizing certain powers reserved to the U.S.A. for its guidance and protection, under Philippine Independence Act 1934'. But in *Suspine v. Compania Transatlantica Centroamericana S.A.*, [1941], United States, S.D.N.Y.; *Annual Digest*, 1938-40, No. 18, Philipinos were held to be individuals owing allegiance to the United States and therefore 'citizens' for purposes of the Neutrality Act 1939. For the final grant of independence see U.S.-Philippines: Treaty of General Relations 1946, Article 1.

⁴ G. A. Resolution 1747-XVI (28 June 1962).

⁵ G. A. Resolutions 1755-XVII (12 October 1962); 1760-XVII (31 October 1962) calling for 'suspension of the enforcement of the Constitution of 6 December 1961'; 1883-XVIII (14 October 1963), 1889-XVIII (6 November 1963). For texts see *Contemporary Survey* (1962-II), p. 287 and (1963-II), pp. 217-18.

⁶ S.C. Resolution 202.

unilateral declaration of independence by the 'minority government', also requesting the United Kingdom not to transfer to

'its colony of Southern Rhodesia as at present governed any of the powers or attributes of sovereignty, but to promote the country's attainment of independence with a democratic system of government in accordance with the aspirations of the majority of the population',

and calling for a constitutional conference.

As negotiations between the United Kingdom and Rhodesian Governments continued without result, and the threat of the latter seizing independence grew, the United Nations General Assembly adopted two resolutions on 12 October and 5 November 1965. The first, cast in terms similar to those of the Security Council resolution of 6 May, but stronger, was adopted by 107 votes to 2 (Portugal, South Africa). France abstained and the United Kingdom did not participate in the vote. The second resolution was adopted by 82 votes to 9, with 18 abstentions, 7 countries being absent and the United Kingdom not participating in the vote.¹ It went much further in calling upon the United Kingdom to 'employ all necessary measures, including military force' to effect the release of all political detainees, the repeal of repressive or discriminatory legislation, including the Law and Order (Maintenance) Act and the Lands Apportionment Acts, and the 'removal of all restrictions on African political activity, and the establishment of full democratic freedom and equality of political rights'.

On 11 November 1965 the Smith régime made a unilateral declaration of independence for Rhodesia. This act was immediately condemned by the United Nations General Assembly in a resolution again adopted by 107 votes to 2 (Portugal, South Africa) with France abstaining and the United Kingdom not participating in the vote. The Security Council has since that date adopted four resolutions on Rhodesia,² to which our three questions must now be directed.

IV

It will be convenient first to distinguish between the political objectives which the resolutions seek to secure, and the measures which they propose that all or some United Nations members should take.

The political objectives are broadly three: the isolation and overthrow of the Smith régime;³ just constitutional arrangements in Rhodesia as a

¹ Of the Commonwealth countries, Australia, Canada and New Zealand voted against the resolution, Gambia and Malta were absent. It is not clear how non-participation is to be distinguished from abstention.

² S.C. Resolutions 216 (12 November 1965); 217 (20 November 1965); 221 (9 April 1966); 232 (16 December 1966).

³ S.C. Resolution 216: 'Decides to condemn the unilateral declaration of independence made by a racist minority in Southern Rhodesia'; S.C. Resolution 217: 'Condemns the usurpation of power by a racist settler minority in Southern Rhodesia. . . .'

condition of independence;¹ and the removal of a threat to the peace presented by the Rhodesian situation.² The measures proposed to be taken comprise constitutional and political action in Rhodesia;³ non-recognition of the Smith régime;⁴ various economic embargoes;⁵ the use of force in Rhodesia;⁶ and the use of force outside Rhodesia.⁷

We may then put our first question as follows: Are any of the three political objectives of the resolutions removed from the United Nations field of action as being within the domestic jurisdiction of the United Kingdom or Rhodesia?

The unilateral declaration of independence in its bearing on this question had, it seems, the consequence either that Rhodesia became an independent State, or that by the fact of rebellion it ceased to be a self-governing colony and United Kingdom responsibility and control were re-established in full.

If we consider these alternatives in turn, it is difficult to say by what traditional criteria Rhodesia fell short of being, after 11 November 1965, an independent State. It had the traditional qualifications of an established community and a defined territory and, in particular, an effective government. Its capacity to enter into relations with foreign States was limited only by the residual responsibility of the United Kingdom in its external affairs; but it was this responsibility, hitherto constitutionally accepted, which the declaration of independence repudiated. Could the assertion of United Kingdom authority over Rhodesia still prevent its being an independent State?

¹ S.C. Resolution 217 called upon the United Kingdom 'as the working of the Constitution of 1961 has broken down, to take immediate measures in order to allow the people of Southern Rhodesia to determine their own future consistently with the objectives of General Assembly Resolution 1514-XV'; S.C. Resolution 232 reaffirmed the 'inalienable rights of the people of Rhodesia to freedom and independence under majority rule.'

² S.C. Resolution 217: 'Determines that the situation resulting from the proclamation of independence is extremely grave . . . and that its continuance in time constitutes a threat to international peace and security.' S.C. Resolution 221: 'Considering that such supplies [of oil] will afford great assistance and encouragement to the illegal régime in Southern Rhodesia, thereby enabling it to remain longer in being: Determines that the resulting situation constitutes a threat to the peace'; S.C. Resolution 232: 'Acting in accordance with Articles 39 and 41 of the U.N. Charter . . .'

³ S.C. Resolution 217: 'Calls upon the Government of the United Kingdom to quell this rebellion . . . and to take all other appropriate measures which would prove effective in eliminating the authority of the usurpers and in bringing the minority régime in Southern Rhodesia to an immediate end.'

⁴ S.C. Resolution 216: 'Decides to call upon all States not to recognize this illegal racist minority regime and to refrain from rendering any assistance' to it. S.C. Resolution 217: 'Regards the declaration of independence as having no legal authority and . . . not to entertain any diplomatic or other relations' with it.

⁵ These provisions of S.C. Resolutions 217, 221 and 232 will be considered in more detail below.

⁶ S.C. Resolution 217: 'Calls upon the Government of the United Kingdom to quell this rebellion.'

⁷ S.C. Resolution 221: 'Calls upon the Government of the United Kingdom to prevent, by the use of force, if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia. . . .'

Earlier practice suggests that it could not. Though the conflict between national policy towards Spain and British commercial interests in Latin America placed obstacles in the way of British recognition of the rebellious Spanish colonies between 1811 and 1823, it was constantly asserted that recognition was not to be withheld as being contingent on that of the metropolitan country. Best C.J. said:¹

'I take the rule to be this—if a body of persons assemble together to protect themselves, and support their own independence and make laws and have courts of justice, that is evidence of their being a State. . . . It makes no difference whether they formerly belonged to Spain, if they do not continue to acknowledge it, and are in possession of a force sufficient to support themselves in opposition to it.'

Sir Hersch Lauterpacht, summarizing the traditional practice said:²

' . . . [The] refusal of the mother country to recognize such independence [of a rebellious province] is not conclusive. The legal title of the parent State is relevant to the extent that clear evidence is required showing that the latter has been definitely displaced and that the effectiveness of its authority does not exceed a mere assertion of right.'

The judgment of the Rhodesian High Court in September 1966³ on the legality of the Rhodesian emergency regulations, renewed by the Smith régime after 11 November 1965, is here in point, and is interesting because the peculiar circumstances led the Court to approach the problem as though it were dealing with the legislation of a foreign régime. Counsel for the applicants, challenging the regulations, put in a certificate signed by Mr. Bottomley, United Kingdom Secretary of State for Commonwealth Relations, to the effect that the United Kingdom did not recognize the declaration of independence, or Rhodesia as 'either a *de facto* or *de jure* régime', and that Rhodesia remained a colony for which the United Kingdom was responsible. In the rare case where an English or colonial court has to consider the status or extent of H.M. dominions held in right of the United Kingdom, the court will either take judicial notice of it⁴ or treat an Executive certificate as conclusive.⁵

¹ *Yrisarri v. Clement*, [1825] 2 G. & P. 223; *British International Law Cases*, vol. 1, p. 71.

² *Recognition in International Law* (1947), p. 26.

³ Keesing, *Contemporary Archives*, p. 21617.

⁴ *Doe & Thomas v. Acklam*, [1824] 2 B. & C. 779 (acknowledgement by the court that the Treaty of Peace of 1783 'acknowledged . . . or rather confirmed' the independence of the rebellious colonies in America).

⁵ *The Fagernes*, [1927] P. 311: 'Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the courts and the Executive on such a matter, where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the government of the country': *per* Atkin L.J. A similar assumption appears to underlie the observation of Parker L.C.J., as to status of a territory: ' . . . it is not for this court to enquire as to the degree of subjection which exists [in a territory under protection] by reason of any treaty, grant, usage or sufferance': *Ex parte Mwenya*, [1960] 1 Q.B. 241 at 277, and see Foreign Jurisdiction Act, 1890, s. 4.

But the certificate presented to the Rhodesian High Court was peculiar in that, quite unnecessarily as it would seem, it was partly cast in the form appropriate to a certificate denying recognition of a *foreign* régime. That the Smith régime was not the lawful government the Rhodesian Court did not deny;¹ but the Court gave the certificate short shrift² in so far as its non-recognition of the Smith régime *de facto* implied that it was not an effective government, that being an accepted criterion, and indeed the principal criterion, of recognition of a régime as a government *de facto*. In sum, Rhodesia in November 1965, more constitutionally advanced than Ireland in 1919–20 or Burma in 1943,³ did not, like the American colonies in 1776, have to face the extended use of force in its territory to maintain its independence, nor could the unilateral declaration be dismissed as a technicality like that of Singapore in 1963.⁴ The failure of the British Government to use force in Rhodesia to quell the rebellion—in fact it renounced its use in advance—the manifest inefficacy of the Southern Rhodesia Act 1965 to restore legality, and the inability of the United Kingdom to overthrow, or even unsettle, the Smith régime without massive international support, together show that for the United Kingdom's authority in Rhodesia there has been substituted a mere 'assertion of right'.

But to the traditional criteria for the recognition of a régime as a new State must now be added the requirement that it shall not be based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage.⁵ This principle was affirmed in the case of Rhodesia by the virtually unanimous condemnation of the unilateral declaration of independence by the world community, and by the universal withholding of recognition of the new régime which was a consequence.

¹ 'The 1965 Constitution is not the lawful constitution of this country and the Government of this country set up under it is not the lawful government. . . . The Government is however the only effective Government of the country and therefore on the basis of necessity and in order to avoid chaos and a vacuum in the law this court should give effect to such measures of the effective government, both legislative and administrative, as could lawfully have been taken by the lawful government under the 1961 Constitution. . . .' Keesing, *Contemporary Archives*, p. 21617.

² *per* Lewis J.: 'It would be ludicrous if this court were obliged to take judicial notice of what the Secretary of State . . . , 6000 miles away, said was the factual position in this country and to regard that as conclusive', *ibid.* In short, unlike the effectiveness of a *foreign* government, the effectiveness of the Smith régime as a government did not, and could not lie within the peculiar knowledge of the Executive in the United Kingdom so as to render the certificate conclusive on this point; *aliter*, as regards the legality of the régime.

³ For the Burmese 'declaration of independence' and of war against the United Kingdom of 1 August 1943, see *Krishna Chettiar v. Subbiya Chettiar*, [1948] Burma High Court: A.D. 1948, No. 178 at 544.

⁴ See *Contemporary Survey* (1963–I), pp. 64–67.

⁵ Universal Declaration of Human Rights, Article 21 (1) and (3); G.A. Resolution 648–VI (Factors indicative of the attainment of independence include, under form of government, 'complete freedom of the people of the territory to choose the form of government which they desire'); G.A. Resolution 1514–XV.

It would follow then that the illegality of the rebellion was not an obstacle to the establishment of Rhodesia as an independent State, but that the political basis and objectives of the régime were, and that the declaration of independence was without international effect.

The second alternative would then ensue, that the very fact of the illegality of a rebellion, which did not achieve the status of independence, deprived the territory of the status of a *self-governing* colony, and removed any basis for the operation of the constitutional 'convention' already discussed: in effect the territory reverted to the position before 1923. Whatever doubts there may have been as to whether constitutional arrangements for the territory were properly within the domestic jurisdiction of the United Kingdom must by the same reasoning be dispelled, for the United Kingdom Government and Parliament alone had lawful authority in Rhodesia after 11 November.¹ Security Council Resolutions 216 and 217 appear to recognize this. The first resolution made no recommendation, and the second took no decision, on economic sanctions; so that the seven Orders-in-Council made on 16 November, containing measures against the new régime, were made not under the United Nations Act 1946,² but under the Southern Rhodesia Act 1965; in the same sense, a draft resolution tabled by the United Kingdom in the Security Council called upon all countries 'to lend all necessary assistance and support to the United Kingdom Government in making effective the measures taken by that Government, including the financial and economic measures, to bring the rebellion in Southern Rhodesia to an end.' This line of support for the exercise of United Kingdom jurisdiction, rather than of generalized measures under Article 41, was followed in substance in Resolution 217.³

The conflict in Indonesia, with which the Security Council had to deal from 1947 to 1949, resembled the Rhodesian situation in that the basic cause was a declaration of independence, in defiance of the metropolitan country, by the Republic of Indonesia. But it was independence in the traditional and respected form of rejection and overthrow of alien rule, not the seizure of power by, and in the interest of, a racial minority. This difference stands out in the handling by the Security Council of the two situations. Though there were extended hostilities in Indonesia between the Netherlands and nationalist forces, and no force was used in Rhodesia at all,

¹ See Southern Rhodesia Act 1965, s. 1. It is not perhaps without significance that there is a return to the older name of the territory both in the Act and the Orders made under it.

² Authorizing Her Majesty by Order-in-Council to comply with United Nations measures under Article 41 of the Charter.

³ Calling upon all States 'to refrain from any action which could assist and encourage the illegal régime, and in particular to desist from providing it with arms, equipment, or military material, and to do their utmost in order to break all economic relations with Southern Rhodesia, including an embargo on oil and petroleum products'.

the Security Council in effect treated the Indonesian conflict as a dispute between equals under Chapter VI of the Charter, but the Rhodesian situation under Chapter VII as an illegal and dangerous rebellion.

It is true that the Indonesian conflict was referred to the Security Council by Australia under Article 39, that the draft resolution which it tabled contained a paragraph calling for a determination of a threat to the peace and for provisional measures under Article 40, and that in the Council debates several members argued that the conflict could and must be dealt with under Chapter VII. But the Netherlands claimed that the Netherlands East Indies was a 'constituent element' in the Netherlands¹ and that the competence of the Security Council was excluded by Article 2 (7) in respect at least of action under Chapter VI or Articles 39 and 40 of Chapter VII.² The Security Council, apparently confident that somehow, somewhere in the Charter, justification for its intervention in Indonesia could be found, struck out the invocation of Chapter VII from the draft resolution, the declared purpose being to avoid any determination of the domestic jurisdiction issue.³ Further, it referred throughout its handling of the Indonesian conflict to the 'Republic of Indonesia' and to its President, though again making no formal determination of its status,⁴ called for the release by Netherlands authorities of the 'President of the Republic of Indonesia' and other political prisoners,⁵ and found that—

'continued occupation of the territory of the Republic of Indonesia by the armed forces of the Netherlands is incompatible with the restoration of good relations between the parties and with the final achievement of a just and lasting settlement of the Indonesian dispute.'⁶

Even if it is said that the Security Council was in fact acting under Chapter VII, the domestic jurisdiction issue was clearly and deliberately by-passed by it.

Resolution 217 stands in sharp contrast. Here the Security Council, considering that 'the Government of the United Kingdom . . . as the Administering Power,⁷ looks upon this as an act of rebellion', found that

¹ Compare *Allied Company v. Netherlands Indies Government*, [1947]. Singapore, Court of Appeal: *Annual Digest*, 1948, No. 13.

² Whatever the meaning of 'enforcement measures' in article 2 (7) it cannot cover these two Articles.

³ *Security Council, Official Records*, 1 August 1947, 172nd meeting. (The *Records* are cited throughout this article as *S.C.O.R.*)

⁴ The invitation of a representative of the Republic of Indonesia to participate in Security Council discussions is not conclusive: by some members it was considered to be under Article 32, by others to be a measure of equity and justice extended to a party to a dispute independent of Article 32, and by at least one member (United Kingdom) to be in direct conflict with Article 32: *S.C.O.R.*, 12 August 1947, 181st meeting.

⁵ *S.C.O.R.*, 24 December 1948, 392nd meeting.

⁶ *S.C.O.R.*, 28th January 1949, 406th meeting.

⁷ The United Kingdom had always objected to this designation in United Nations debates on

the Rhodesian declaration of independence had 'no legal validity' and that the Smith régime were mere usurpers.

Again, the same resolution calls upon the United Kingdom, as the only lawful authority, to quell the rebellion and use any appropriate measures to eliminate the Smith régime; such measures must be taken to include some exercise of force, if only in the form of arrest and detention.

Finally, we may ask whether, when a State refers a situation to the Security Council, it must be taken to have waived or abandoned its domestic jurisdiction over elements of the situation that would normally be within it. This notion seems to underlie the hardly coherent, and obviously tactical, public statement by Mr. Smith¹ that, by inviting Security Council action in its Resolution 232, the United Kingdom had abdicated or lost control of the situation and had severed its links with Rhodesia, which had as a consequence become a republic outside the Commonwealth. Apart from the fact that this reasoning presupposes a form of Crown authority in Rhodesia, which the Smith régime had by the very declaration of independence already denied, it confuses the Rhodesian situation as a whole with matters or elements of domestic jurisdiction within it. Reference of the situation to the Security Council does not of itself imply an abandonment of domestic jurisdiction over particular elements in it.

Certain conclusions on our first question are suggested:

1. Since Article 2 (7) speaks of matters, not of situations, within domestic jurisdiction, a situation with which the Security Council has to deal may contain elements within its competence and elements where its intervention is limited or precluded.
2. The basis and character of the Smith régime precluded a status of independence and were matter of international concern, for the reasons expressed in earlier General Assembly Resolutions and in Security Council Resolution 216, and also as a threat to the peace declared in Resolution 217.² Nevertheless, of the three political objectives of the Security Council resolutions, while the removal of the threat to the peace was the primary responsibility of the Security Council, the internal overthrow of the Smith régime and just constitutional arrangements for Rhodesia were, initially and in law at least, within the exclusive jurisdiction of the United Kingdom.
3. The resolutions recognized this distinction in limiting intervention in Rhodesia in the first place to a call upon the United Kingdom, as the

Rhodesia before 11 November 1965, for reasons already explained. In voting for S.C. Resolution 217 the United Kingdom appears to have accepted it as being there appropriate.

¹ *The Times*, 23 December 1966.

² France did not accept this position, and consistently abstained from voting on all the resolutions.

responsible authority, to quell the rebellion and bring the constitutional arrangements up to the accepted international standard, the actual measures necessary for this being properly left within the domestic jurisdiction of the United Kingdom;¹ in particular, no United Nations authority was required, or expressed to be given, for any use of force by the United Kingdom in Rhodesia.

4. What is a matter of domestic jurisdiction for purposes of Article 2 (7) is, however, a question of mixed law and fact; and where *exercise* of the jurisdiction claimed is either impossible or manifestly ineffective, the matter must cease to be essentially within domestic jurisdiction.

V

Was the situation in Rhodesia a threat to the peace? The Security Council approached this issue cautiously. In the somewhat analogous situation in South Africa it had said of the policy of apartheid that it 'disturbs the peace'. Resolution 216 on Rhodesia was silent on the point; Resolution 217 in describing the situation said that its 'continuance in time constitutes a threat to the peace', ambiguous language which suggests more than one voice and so some underlying disagreement; Resolutions 221 and 232, however, make a clear and express determination of a threat to the peace.

Portugal, in its challenge to Resolution 221,² argued that since no proof was exhibited in the resolution that the peace was threatened, it could impart no obligations of any kind for members. This raises interesting questions of the juridical character of a determination under Article 39. Such a determination rests primarily on findings of facts and political and military judgments upon them. The determination is a condition precedent to important measures under Chapter VII, both by the Security Council and by United Nations members, some of which might otherwise be unlawful. Further, that a determination under Article 39 is conclusive for United Nations members is clear from the fact that they have under the Charter made it an exclusive function of the Security Council, which 'shall determine' (*constate* in the French text).

A determination under Article 39 has then some of the characteristics of a judicial decision: it is definitive of a factual situation, it must be

¹ Compare a 'directive' under European Economic Community Treaty, Article 189. See also S.C. Resolution 188 (29 April 1964) where the United States and United Kingdom, though of the opinion that the policy of apartheid in South Africa is a matter of international concern, abstained on a Resolution calling for the abandonment of the Rivonia trial and the revocation of death sentences, as an improper interference with judicial processes in a member State.

² Statement of the Portuguese Foreign Minister (29 April 1966), Keesing, *Contemporary Archives*, p. 21417.

accepted by United Nations members and any interested parties, and it has the consequence of providing a legal basis for action that might otherwise be unlawful. But it is hardly practicable to extend the analogy so as to impose on a determination under Article 39 all the conditions of judicial process; for example, to require as suggested by Portugal, that the reasons for the determination should be fully set out in the resolution, or to make an advisory opinion of the International Court a precondition.¹

That there should be hesitation in describing the consequences of the Rhodesian declaration of independence as a threat to the peace was natural, since the Smith régime gave no sign of the external use of force, and the anger of some African countries with the United Kingdom was directed precisely against its renunciation of a use of force, which they were unwilling or unable to embark on themselves. But the exercise by the Security Council of political and strategic judgment of what is a threat to the peace must remain a matter of prediction, not of proof or demonstration. Further, the determination is part of its preventive and peace-keeping, as distinct from its enforcement, functions, and is directed primarily not to the actual use of armed force across frontiers, but to the removal of tension and the avoidance or control of actions likely to provoke the use of force, regardless of who initiates them. In the Rhodesian situation there was ground for the determination of a threat to the peace in these senses if only in the Rhodesian threat to compel immigrant workers from Malawi and Zambia to return home, the precarious position of the Kariba Dam, the infiltration into Rhodesia of armed irregulars, and possible United Kingdom measures outside Rhodesia to prevent assistance being given to the rebel régime.

The efficacy of a request for an advisory opinion of the International Court would obviously depend on the question or questions put. But there are at least two forms of question which might cause the Court to refuse an opinion.² If the abstract question were put of the meaning of a 'threat to the peace' in Article 39, the Court might hold that this task of interpretation was an essential step in a determination by the Security Council, and that it was therefore reserved, along with the determination, to the Security Council. If the question were put in terms of the Rhodesian situation the Court might again hold that an opinion would be the

¹ Sir Lionel Heald Q.C. and Sir Derek Walker-Smith Q.C. (letter to *The Times*, 14 January 1967). The erroneous argument in the same letter, that a determination of a threat to the peace under Article 39 is limited to cases of unsettled disputes between States, was disposed of by the Lord Chancellor in a debate in the House of Lords (*The Times*, 1 February 1967).

² An advisory opinion of the Court 'represents its participation [as principal organ] in the activities of the Organisation, and in principle should not be refused': *Interpretation of Peace Treaties*, I.C.J. Reports, 1950, p. 71. But it does not follow that it may not be refused if the Charter provisions, of which Article 39 may be the unique case, reserve interpretation to a particular organ.

equivalent of a determination under Article 39, which was a political decision¹ and, in any case, reserved to the Council.

VI

Resolution 221 was unique in expressly authorizing a use of force by a member State outside its jurisdiction and in itself unlawful.² It is to be observed that, with the exception of the paragraph quoted, the remainder of this resolution and all the operative provisions of Resolution 232 involve action within the jurisdiction of the States³ to which calls or commands are addressed by the Security Council.

Further, amendments to the United Kingdom draft of what became Resolution 232, which were tabled by Nigeria, Mali and Uganda (the African members of the Security Council), were rejected: these amendments deplored the refusal of the United Kingdom to use force in Rhodesia, and invited the United Kingdom to prevent the transport of oil to Rhodesia 'by all means',⁴ which could have included measures against South Africa.

The paragraph quoted from Resolution 221 poses two problems: Under what Article of Chapter VII does it fall, and, if action under the paragraph is not dictated by Article 25, could the Security Council Resolution be invoked as authorizing an otherwise unlawful act?

In execution of the terms of the paragraph, H.M.S. *Berwick* intercepted the tanker *Manuela* on the high seas and informed the master that 'in view of the United Nations resolution, the tanker could not be allowed to proceed to Beira, and that the British Government had authority if necessary to use force to prevent this.' The master demurring, a naval armed party was put on board and remained until the master agreed to set course for Lourenço Marques.⁵ The *Joanna V* left Beira without discharging oil, so that the condition for action against her did not arise.

It appears that the Greek registration of the *Manuela* had been cancelled by official action in Greece, but it does not follow from this that boarding of

¹ Here 'political' characterizes not the motivation of the request for the opinion, but the fact that such a decision goes beyond the mere interpretation of expressions in Article 39. The observations of the Court on the political elements which may be disregarded in giving an advisory opinion, would not then apply: see *Admission* case, *I.C.J. Reports*, 1948, p. 155.

² 'Calls upon the Government of the United Kingdom to prevent by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia, and empowers the United Kingdom to arrest and detain the tanker known as *Joanna V* upon her departure from Beira in the event her oil cargo is discharged there.'

³ Though not necessarily within their competence without domestic enabling legislation.

⁴ This amendment obtained seven votes, but was lost in face of eight abstentions. Compare a similar amendment by Uganda and Mali to S.C. Resolution 221, also defeated: *S.C.O.R.*, S/7243.

⁵ Report to Secretary General by Lord Caradon, United Kingdom Permanent Representative to the United Nations: *S.C.O.R.*, S/7249, 11 April 1966.

the vessel by a foreign armed party on the high seas is lawful. It is true that the Judicial Committee of the Privy Council has stated that only those ships 'which sail under the flag of a State may claim the protection of a State and freedom to sail on the high seas exempt from seizure'.¹ But it is believed that this statement goes too far if it is to be interpreted as saying more than that a stateless ship is not under the jurisdiction of any State and that it may, if it acts unlawfully, be subject to seizure. But a ship without nationality is not *res nullius*, and the fact that it is not under the jurisdiction of any State does not mean that the rights and interests of the owners or charterers in the ship or its cargo may be infringed without lawful excuse, or that the owner or charterers may not invoke the protection of their State of nationality. So the High Seas Convention, Article 22, limits the right of a warship to board a merchant vessel on the high seas to circumstances not present in the case of the *Manuela*, 'except where acts of interference derive from powers conferred by treaty'. In particular, the continuance of normal trade with an illegal régime cannot be regarded as unlawful intervention entitling the lawful government to take counter-action in the form of interference with shipping on the high seas.

From the angle of the United Nations Charter it is hardly possible to regard the deployment of H.M.S. *Berwick* and its armed boarding party, which compelled the *Manuela* to alter course away from Beira, as other than the use of armed force. But the conditions of its use had been closely circumscribed, and the force involved was minimal, and it might be said that the 'armed force', envisaged in Article 41, and applicable under Article 42, must be of a certain intensity and scale, which the naval action against the *Manuela* did not reach. But there are objections to this interpretation. First, there is nothing in Article 42 to suggest that only major hostilities are contemplated; on the contrary, a blockade may be effective without a shot's being fired and 'demonstrations' are in their very nature a show rather than a use of force.² Second, it is obviously desirable, and closer to the purposes of the Charter, that the use of force by or through the United Nations itself should be as far as possible restricted in time and place to what is necessary to maintain or restore peace.

If the action against the *Manuela* cannot be founded on Article 41, as involving the use of armed force, it is tempting to regard it as a naval

¹ *Molvan v. Attorney-General for Palestine*, [1948] A.C. 381 P.C.

² The testing of the Corfu Channel passage by a British naval force was a 'demonstration' in this sense, and so far from denying it the character of force, the Court said, having examined the dispositions on board the ships: 'But four warships . . . passed in this manner with crews at action stations, ready to retaliate quickly if fired upon. They passed one after another through this narrow channel close to the Albanian coast, at a time of political tension in this region. The intention must have been not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing ships', *I.C.J. Reports*, 1949, p. 31.

operation by a United Nations member on behalf of the Security Council under Article 42 itself. But again there are difficulties.¹ The economic sanctions called for from all members in Resolution 217 had by April 1966 plainly proved, in so far as they had been applied at all, to be inadequate to remove the Smith régime and the threat to peace it posed; but Resolution 217, unlike Resolution 232, was not expressed to be a 'decision' under Article 41, and the Security Council is not, under the terms of Article 42, entitled to resort to the use of force before it has tested the efficacy of *compulsory* measures under Article 41,² or has plain grounds for believing that they would be inadequate.³

The naval action can hardly be a 'provisional measure' under Article 40, if only for the reason that the Security Council had already adopted operative resolutions on the Rhodesian situation, covering in part the same ground as Resolution 221. The Security Council has ordered provisional measures in situations with which it has already been dealing, only where there has been a marked change for the worse, as, for example, in the breach of a cease-fire agreement already secured, or in the abrupt and threatening movements of forces. Further, while all provisional measures under Article 40 are in a sense preventive, they are not to be identified with the preventive measures taken by the Security Council itself, and indirectly referred to in Articles 2 (5), 5 and 50; for provisional measures are ordered to be taken by the parties in conflict and aimed at their separation, or at the suspension of prejudicial acts. The naval action against the *Manuela* cannot be brought within this framework.

There remains, as the basis for it, a recommendation under Article 39. But can the Security Council by a recommendation 'empower' a United Nations member to use on its behalf force, which is in itself unlawful? It may well be that the powers of the Security Council under Chapter VII of the Charter are among the treaty powers envisaged in the exception to the High Seas Convention, Article 22, already mentioned,⁴ but was the treaty power properly exercised in this case? A recommendation under Article 39 for the use of force, strictly limited in scale, object, time and place, to serve the purposes of the Charter, appears to be a proper exercise of these

¹ The absence of special agreements under Article 43 is not an obstacle to the use of force by a United Nations member at the direction and on behalf of the Security Council: *Certain Expenses* case, *I.C.J. Reports*, 1962, p. 167.

² See the unanimous report of Committee 111/3 of the San Francisco Conference, cited in Goodrich and Hambro, *Charter of the United Nations*, (1949), p. 265.

³ The adoption of S.C. Resolution 232 makes it impossible to maintain that such grounds underlay S.C. Resolution 221.

⁴ Other examples appear to be conventions to deal with 'cabaret' ships and, recently, 'pirate' radio ships in the North Sea, and conventions on customs control. It may also be noted that Article 103 of the Charter would not override High Seas Convention, Article 22, unless a decision covered by Article 25 of the Charter was in issue.

powers of the Security Council, of which it has not been divested by the lack of its own forces made available under Article 43.¹

But the concept of a recommendation having the effect of rendering an otherwise unlawful act lawful is not free from objection. What in fact is missing in the Charter is an express power of the Security Council to authorize action, a power going beyond recommendation, but falling short of a decision covered by Article 25. In placing the naval action in the framework of the Charter, the choice lies between Articles 39 and 42, but there are serious difficulties with either, and the conclusion may perhaps be that it was anomalous, and outside the Charter.

Resolution 232, adopted on 6 December 1966,² stands out, in contrast to the earlier resolutions, both in its clarity of purpose and in the firm foundation given to it in Charter Articles: 'Acting in accordance with Articles 39 and 41', the Security Council 'decides that all States members of the U.N. shall prevent' commerce with Rhodesia in five categories, including the importation from Rhodesia of selected commodities, the sale of arms to Rhodesia and participation in the supply of oil or oil products to it. All United Nations members are called upon to comply with the decision in accordance with Article 25, and this is further underlined by a declaration that refusal to implement the terms of the resolution shall be a violation of the Charter. Non-members were also called on to comply with its terms.

But there is still a serious weakness in the resolution, in that, while calling for reports to the Security Council, it makes no other provision for the co-ordination of measures to be taken. Here the Security Council chose to ignore the advice of the Expert Committee, set up by it in 1964 to consider the character and feasibility of economic sanctions against South Africa.³ The Committee, reporting in March 1965,⁴ produced an elaborate study of the whole problem of the measures that may be taken under Article 41 of the Charter. The Committee had been virtually unanimous that, where the Security Council orders measures under that Article, a committee, to coordinate the action taken, must be established as an essential condition of their success.

¹ *Certain Expenses case*, *I.C.J. Reports*, 1962, p. 167.

² Bulgaria, Mali, France and the U.S.S.R. abstained.

³ S.C. Resolution 191/64.

⁴ *S.C.O.R.*, S/6210 and Add. 1, 2 March 1965.

CRIMINAL JURISDICTION OVER VISITING FORCES WITH SPECIAL REFERENCE TO INTERNATIONAL FORCES*

By D. S. WIJEWARDANE¹

MILITARY forces operating under the authority of the United Nations have a distinct international character, yet the problems of jurisdiction *vis-à-vis* the host State are basically old problems. The method of composition of the forces has so far been for the United Nations not to recruit directly but to request contributions of contingents of armed forces from member States. These contingents are organized bodies with their own rules and discipline, courts of law and methods for enforcement. Even if forces are directly recruited by the United Nations they may well have the traditional characteristics of armed forces which distinguish them sharply from diplomatic agents or officials of international organizations.

Thus, whilst it will be the purpose of this article to examine in some detail the specific arrangements made with respect to international military forces, some preliminary examination of the customary and treaty law relating to the friendly visiting forces of States is necessary. This law not only indicates the nature of the problems to be faced by United Nations forces but may also be invoked in cases where a *lacuna* exists in the specific arrangements regarding United Nations forces. Moreover, since United Nations forces are likely to be dispatched in a situation of emergency, they will be called upon to operate, as in Suez, the Congo and Cyprus, before any specific agreement can be negotiated. In such cases it can be argued that the basic principles affecting their status are to be derived from the traditional body of law relating to visiting forces in general.

PART I: THE CUSTOMARY INTERNATIONAL LAW

Chapter I

THE EMERGENCE OF A GENERAL RULE OF CONCURRENT JURISDICTION

THE judgment of Marshall C. J. in the *Schooner Exchange* v. *M'Faddon*² is the starting-point of any discussion of modern practice. The plaintiff asserted title against a public armed vessel of a foreign State whilst the

* © D. S. Wijewardane, 1967.

¹ M.A., B.C.L. (Oxon.); of the Middle Temple Barrister at Law; sometime Humanitarian Trust Student in public international law in the University of Cambridge.

² (1812), 7 Cranch 116; 3 U.S. Sup. Ct. Rep. (L.Ed.) 287.

ship was in an American port. The claim was dismissed on the basis that the ship, being part of the naval forces of the French State, was immune from the civil jurisdiction of the American courts. The case, it is submitted, is authority for two propositions. First, that the host State is, without any express agreement, under an obligation to grant some immunity. Secondly, that a claim to title against a ship forming a part of the naval forces of a friendly foreign sovereign comes within this immunity.

Since 1942 a controversy has raged on the extent of this immunity. One writer restricts it to immunity from supervisory jurisdiction,¹ although the judgment nowhere mentions the term or refers to the idea, and, as we have said, deals with a question of title. However, Marshall C.J., in the much-quoted passage² of his judgment used the analogy of troops of a foreign prince allowed to pass through the dominion of another State. The same writer attempts to restrict the scope of the judgment by making a distinction between troops passing through and troops stationed in a foreign State.³ Another writer⁴ has cited the case as a basis for claims to the fullest immunity. In truth, Marshall's judgment seems to be entirely neutral in this controversy. The content of the immunity was a question which was not touched upon and the answer to this question must be sought elsewhere in the views of writers, and State practice, including international agreements, statutory provisions and case law.

Space does not allow for a survey of the views of all the various writers.⁵ However, the basic controversy can be illustrated by reference to articles by King⁶ and Barton.⁷ 'It is concluded', writes King,⁸ 'that the general principle is abundantly established by reason, authority and precedent, that the personnel of the armed forces of Nation A, in Nation B by the latter's invitation or consent, are subject to the exclusive jurisdiction of their own Courts-Martial and exempt from that of the Courts of B, unless

¹ Barton, 'Foreign Armed Forces—Immunity from Supervisory Jurisdiction', this *Year Book*, 26 (1949), p. 380.

² Loc. cit. in n. 2 on previous page, at p. 294.

³ Barton, 'Foreign Armed Forces—Immunity from Criminal Jurisdiction', this *Year Book*, 27 (1950), p. 186, at p. 218.

⁴ King, 'Jurisdiction over Friendly Foreign Armed Forces', *American Journal of International Law*, 36 (1942), p. 539.

⁵ For a convenient summary see Re, 'The NATO Status of Forces Agreement and International Law', *North-Western University Law Review*, 50 (1956), p. 349. See also Schwelb, 'Jurisdiction over the Members of the Allied Forces in Great Britain', *Czechoslovak Year Book of International Law* (1942), p. 147, at p. 150, and Bathurst 'Jurisdiction over Friendly Foreign Armed Forces—The American Law', this *Year Book*, 23 (1946), p. 338, at p. 339, nn. 1 and 2.

⁶ Apart from references already cited, see also King 'Further Developments concerning jurisdiction over Friendly Foreign Armed Forces', *American Journal of International Law*, 40 (1946), p. 257.

⁷ Apart from the two articles already cited, see also Barton, 'Foreign Armed Forces—Qualified International Immunities', this *Year Book*, 31 (1954), p. 341.

⁸ King, loc. cit. in n. 4 on this page, at p. 567.

such exemption be waived'. Barton,¹ on the other hand, claims that 'it has been shown that there exists a rule of international law according to which members of visiting forces are, in principle, subject to the exercise of criminal jurisdiction by the local courts and that any exceptions to that general and far-reaching principle must be traced to express privilege or concession'. It is submitted that the weight of evidence from State practice supports neither of these views.

Two World Wars and a Cold War have provided considerable, if not consistent, State practice on this question. In a sense it would be artificial to examine the available material as though there were a conscious attempt to answer the question—Is there an obligation to confer immunity and, if so, what is the content of such an obligation? This is so because the most cursory examination reveals that the angle from which the problem is attacked has been a more practical, administrative one. *Ad hoc* arrangements have been made with the hope, no doubt, that difficulties could be obviated at an administrative level by negotiation. Nevertheless, this cannot and should not preclude an examination of the State practice with a view to ascertaining whether any principles emerge and, if so, what they are.

It is proposed to examine the more significant material in this field under three heads. Under the first there will be an analysis of material which may support the view that visiting forces have exclusive jurisdiction over the members of their forces; the second will classify what evidence there is in support of the exclusive jurisdiction of the host State; and finally, under the third, the evidence which supports concurrent jurisdiction will be considered.

State Practice Favouring the Exclusive Jurisdiction of Visiting Forces over Members of their Force

With the outbreak of the First World War the question of jurisdiction over friendly forces came to the fore. Some of the earlier agreements do not illuminate the problem under discussion because they fail to distinguish foreign and friendly forces from forces occupying with consent.² This distinction had certainly been made, however vaguely, prior to the beginning of the First World War. Basically the distinction rests on how far the territorial sovereign is prepared to confer or agree to a jurisdiction of a visiting force which embraces not only its own personnel but also

¹ Barton, 'Foreign Armed Forces—Immunity from Criminal Jurisdiction', this *Year Book*, 27 (1950), p. 186, at p. 234.

² See *Clunet*, 45 (1918), p. 516, for illustrations of French forces occupying the Papal States (1849–70) with jurisdiction over civilian inhabitants and of French forces in Italy in 1859 to assist in the war against Austria. For a more recent example see Agreement of 12 July 1950 relating to Jurisdiction over Offences by United States Forces in Korea, *United Nations Treaty Series*, vol. 222, p. 229.

civilian inhabitants who may commit offences against the military law of the visiting force. In one sense it is almost as though the visiting force is conceded a kind of *de facto* occupation of that part of the host State's territory on which it operates, although there can be no question of the acquisition of any formal legal title. The difference between the two degrees of jurisdiction is evident from a comparison of agreements concluded during the early years of the war. The Franco-Belgian agreement of 14 August 1914,¹ concluded within two weeks of the outbreak of the war, gave the service authorities of the visiting army the right to exercise jurisdiction over any person who committed offences against that force. A similar provision was suggested when, some months after the beginning of the war, an agreement between France and the United Kingdom was negotiated: but the final agreement of 15 December 1915² discarded the analogy to occupation forces by providing for 'the exclusive competence' of the service authorities in regard to 'persons belonging to these armies in whatever territory and whatever nationality the accused may be'. Specifically modelled on this was the agreement between France and the United States.³ The agreement between the United States and Belgium was also in very similar terms⁴ and France allowed the same immunities to other visiting forces.⁵ The proposed agreement between the United States and Great Britain during this period was also couched in almost identical words to the above agreements and was certainly the same in substance. Prior to its conclusion, however, the war ended, the American forces were withdrawn and the matter dropped.⁶ The agreement between the United Kingdom and Belgium of 15 April 1916⁷ was also very similar to these agreements and provided for the 'exclusive right of jurisdiction of the service authorities of their respective armies in the field in regard to persons belonging to those armies . . .'. It will be observed that this convention is slightly narrower than the Franco-British agreement of December 1915, in that it relates only to armies in the field. But they all have in common the grant of 'exclusive jurisdiction' to the authorities of the forces over their personnel.

¹ This *Year Book*, 26 (1949), p. 388; *American Journal of International Law*, 36 (1942), p. 549.

² Declaration of the British and French Governments, *Foreign Relations of the U.S.A.* (1918), Suppl. 2, p. 735, para. 1; *London Gazette*, 31 December 1915, p. 3025.

³ Exchange of notes between France and United States of America of 1 October 1917, 3 January 1918, 14 January 1918, *Foreign Relations of the U.S.A.* (1918), Suppl. 2, pp. 734-7. See also quotation from Maj.-Gen. Walter A. Bethel, Judge Advocate of the American Expeditionary Forces in France, *American Journal of International Law*, 36 (1942), p. 550.

⁴ See exchange of notes between the United States of America and Belgium of 5 July 1918, 6 September 1918, *Foreign Relations of the U.S.A.* (1918), Suppl. 2, pp. 747, 751.

⁵ Franco-Serbian Agreement, 14 December 1916; Franco-Italian Agreement, 1 September 1917; Portuguese Agreement, 15 October 1917; Franco-Siamese Agreement, 24 May 1918.

⁶ See correspondence between the two countries beginning 27 April 1918 and ending 30 January 1920, *Foreign Relations of the U.S.A.* (1918), Suppl. 2, pp. 741-60.

⁷ Convention of 15 April 1916, *London Gazette*, 14 April 1916, p. 3917.

These agreements represented the reaction of the States involved in the particular events of 1914–18. Whilst a common pattern is clearly visible, the provisions are very general and do not contain any express statement of the relationship of the service courts to the local courts of the host State. However, the expression ‘exclusive competence’ cannot be taken to mean ‘concurrent jurisdiction’. Though there is no specific mention of immunity from the jurisdiction of the local courts, this must follow from the ‘exclusive competence’ of the authorities of the visiting force.¹ The case of *R. v. Aughet*,² the only instance of a judicial consideration of one of these agreements (the United Kingdom–Belgian Convention of 15 April 1916) is not inconsistent with this view since the agreement there in question was not incorporated into English municipal law and the case cannot, therefore, be taken as interpreting the expression ‘exclusive competence’ used in the agreement. Further, as we shall see later, in this case, though English courts exercised their jurisdiction, every effort was made to give effect to the agreement.

During this period, therefore, the basic idea underlying State practice seems to have been the exclusive competence of visiting forces over their personnel, although towards the end of the First World War the notion of concurrent jurisdiction may have been beginning to develop.³

The inter-war period, as may be expected, does not provide much evidence. Two agreements entered into by the United Kingdom, one with Iraq and the other with Egypt, must, however, be noted. Under these, United Kingdom troops stationed in these two countries had complete immunity from the criminal jurisdiction of the local courts. The Treaty of Alliance of 10 October 1922 between Great Britain and Iraq⁴ provided for military assistance to Iraq and for the conclusion of a separate agreement defining the conditions under which British forces were to be stationed in Iraq. In pursuance of this provision a military agreement was signed between the two countries on 25 March 1924, under Article 10 of which Iraq undertook to ‘recognize’ the right of the British authorities to exercise over all members of their forces the ‘control and jurisdiction’ provided for by British military law. Article 10 (*d*) specifically referred to the obligation to recognize the ‘immunity from arrest, search, imprisonment or trial by the civil power in Iraq in respect of criminal offences for all enrolled and enlisted members of such forces . . .’.

The Anglo-Egyptian Convention on the status of British Forces in Egypt was signed on 26 August 1936,⁵ on the same day as the Treaty of

¹ But see Barton, this *Year Book*, 26 (1949), p. 388, n. 2.

² (1917), 34 T.L.R. 13.

³ Defence of the Realm Reg. 45F, S.R. & O., No. 367, March 1918. Also, British note to the American Ambassador in London, *Foreign Relations of the U.S.A.* (1918), Suppl. 2, p. 734.

⁴ *United Kingdom Treaty Series*, No. 17 (1925), Article 7; Cmd. 2370.

⁵ *Ibid.*, No. 6 (1937), p. 23; Cmd. 5360.

Alliance between these two countries and in pursuance of Article 9 of that Treaty. The question of criminal jurisdiction was dealt with by Article 4 which stated: 'No member of the British Forces shall be subject to the criminal jurisdiction of the Courts of Egypt, nor to the civil jurisdiction of those courts in any matter arising out of his official duties . . .'. Some difficulty arose out of the interpretation of this Article, especially since there was a discrepancy in punctuation between the Arabic, French and English texts. The difficulty was judicially settled in *Ministère Public v. Spender*,¹ where it was finally held that this immunity from criminal jurisdiction was complete and was not qualified by the words ' . . . any matter arising out of his official duties', which qualified the immunity from civil jurisdiction of the local courts. This interpretation, it may be pointed out, is in line with Article 10 (e) of the Anglo-Iraqi Agreement, which placed this point beyond any doubt.

Some of the cases concern themselves with the problem whether the person in question was or was not a member of the force, but this is an entirely different question which need not detain us here.²

The Second World War is the remaining source of evidence under this head. The United States forces serving in allied countries claimed, and were ultimately granted, complete immunity in criminal matters. It is unnecessary to go into the wave of legislation that resulted in all countries in which American forces served,³ for the agreement with the United

¹ *Annual Digest*, 1938-40, case No. 191, p. 478. Here it was an established fact that the accused, who was charged with assault, had acted outside his course of duties and on the occasion of a private argument. On the general question 'who determines whether a matter arises out of official duty or not', see below p. 143.

² See *Holder v. Ministère Public*, *Annual Digest*, 1946, case No. 38. And, generally on the question what is an armed force and who can claim membership, see *Tucker v. Alexandroff* (1902), 183 U.S. 425; 46 U.S. Supp. Ct. Rep. (L.Ed.) 264; Fuller C. J., Gray, Harlan and White JJ., dissenting on the basis that the petitioner was merely one of a squad of men intended at some future time to become, but which had not yet become, the crew of a Russian warship. Also, *Chow Hung Ching and Si Pao Kung v. The King*, *Annual Digest*, 1948, case No. 47; (1948), 77 C.L.R. 449, especially *per* Latham C.J. at 467-8 and, *per* Dixon J. at 484-6. The appellants who were charged with assaulting a native of Manus Island (in the mandated territory of New Guinea) were two of a group of 300 Chinese nationals sent there to collect and dispatch surplus war supplies sold to the Republic of China by the U.S.A. The labourers were uniformed, placed under Chinese officers and subject to military discipline. They were, however, unarmed and were referred to in evidence as having been recruited to work as 'labourers and workmen', the appellants being respectively a shoemaker and a carpenter. No express permission was granted by the Australian Government for the party to enter as an armed force of a friendly State. In the circumstances the High Court of Australia held (1) the question whether the appellants are a part of the military forces of another State is a question of fact and law which must be determined by the Court before the question of jurisdiction arises. (2) That even if by virtue of a general principle of international law the members of a visiting armed force were entitled to immunity the appellants were not, being labourers with a predominantly civilian not military task. 'I think', said Dixon J., 'that the true view is that a party of Chinese workmen were sent in charge of a detachment of officers and men of the Chinese Army. The present case is distinguishable from one where a person though unarmed and performing a non-fighting task is yet a member of a bigger military force. These men were not auxiliary to any force.'

³ See Barton, this *Year Book*, 27 (1950), pp. 209-16.

Kingdom and the ensuing British Act may be taken as typical of the position.

The U.S.A. Visiting Forces Act of 1942 implemented the agreement between the two countries embodied in an Exchange of Notes of 27 July 1942.¹ Sec. 1 (4) reads: 'Subject as hereinafter provided, no criminal proceedings shall be prosecuted in the United Kingdom before any Court of the United Kingdom against a member of the military or naval forces of the United States of America.' Whatever the principle underlying the practice during the First World War, it is clear that in 1942 complete immunity was considered a concession to American demands and a deviation under exceptional circumstances from the concept of concurrent jurisdiction which had by then taken firm root. In the British Note Sir Anthony Eden describes it as 'a very considerable departure . . . from the traditional system and practice of the United Kingdom'. This view was subsequently endorsed by an Egyptian Court in *Manuel v. Ministère Public*.² The Court there said: 'The practice of the Egyptian Government has not differed from the United Kingdom. This is proved by the official notice given regarding the conditions of sojourn of Greek forces in the territory and also by the military proclamation No. 375 of 2 March 1943 which grant immunity from criminal jurisdiction to military forces of the U.S. without retrospective effect and for a period which will terminate automatically at the end of the war. This proclamation, like the Anglo-Egyptian Convention of 1936, *creates moreover new and exceptional rights granted of its own free will by the Egyptian Government*.' The Supreme Court of New South Wales took the same position in *Wright v. Cantrell*³ in 1943. Barton, after an exhaustive review of the legislation in other countries relating to American forces, comes to the same conclusion.

It may be noted that, unlike the early agreements, the Act of 1942, whilst granting complete immunity, specifically envisages in Sec. 1 (i) the possibility of the waiver of immunity. The proviso to Sec. 2 (i) says: 'Provided that upon representations made to him on behalf of the Government of the United States of America with respect to any particular case, a Secretary of State may by order direct that the provisions of this sub-section shall not apply in that case.' In that way, the power is reserved, in cases of waiver, to restore the jurisdiction of the courts of the United Kingdom to deal with that case.⁴

¹ 5 & 6 Geo. VI, c. 31. The Exchange of Notes is appended to the Act.

² *Annual Digest*, 1943-5, case No. 42.

³ *Ibid.*, case No. 37; St. Reps. of N.S.W. (1944), vol. 44, p. 5.

⁴ See the British note, paragraph 2.

State Practice Regarding the Exclusive Jurisdiction of the Host State

The scarcity of the evidence demonstrates that the exclusive jurisdiction of the host State does not represent the international norm. There seems to be no example of a diplomatic claim or of a judicial decision that the visiting forces are subject exclusively to the jurisdiction of the host State. The denials of immunity from the jurisdiction of the host State have taken the form of a denial of complete immunity, not a complete denial of immunity. Thus Cassel J., in *R. v. Navratil*,¹ whilst holding that the English courts had jurisdiction, stated 'the Czechoslovak authorities may well possess jurisdiction to try this offence. I am not here to decide whether they have or not. The sole question raised by the defence is, has this court got jurisdiction.'

State Practice Favouring Concurrent Jurisdiction

Concurrent jurisdiction means the power of two authorities to exercise jurisdiction in relation to the same matter. This does not necessarily involve immunity but when, for one reason or another, a solution is sought to the problem of concurrent exercise of jurisdiction the question of immunities may become relevant.

There is little doubt that the bulk of the evidence of State practice falls into this category. One of the earliest judicial indications of this trend is *R. v. Garret, Ex parte De Dryer*,² where a Belgian army officer shot and wounded a Belgian soldier in a building in London owned by the Belgian Government and used by the Belgian army. There existed a convention between the United Kingdom and Belgium³ under which the authorities of the force had extensive rights of jurisdiction over their personnel in the field of operations, but the convention had not been given statutory effect. Since the offence concerned exclusively Belgian personnel, a claim for immunity under customary international law might have been advanced,⁴ but this does not appear to have been done. Nevertheless, the history of the case creates the definite impression that the English courts recognized, at least, the concurrent jurisdiction of the Belgian authorities. First, the metropolitan magistrate, whilst exercising jurisdiction, adjourned the case so as to permit the Belgian authorities to charge the officer concerned. Then an attempt was made to obtain a writ of mandamus to compel him to hear the case. At this stage the attention shifted entirely from the problems of jurisdiction and immunity, and devolved on the power of adjournment possessed by the metropolitan magistrate under

¹ *Annual Digest*, Suppl. vol. 1919-42, case No. 85, p. 164.

² (1917), 34 T.L.R. 13 (*R. v. Aughet*, 34 T.L.R. 302).

³ See above, p. 125, n. 7.

⁴ *The Times*, 22 and 28 September 1917; 13 and 17 October 1917.

Sec. 36 of the Police Courts (Metropolitan) Act of 1839.¹ It was held that the application for mandamus must be refused on the ground that the magistrate had the discretion to postpone the case and that he had properly exercised his discretion. Meanwhile the officer was tried and acquitted by the Belgian court-martial at Calais. He then voluntarily submitted to the jurisdiction of the English court and successfully raised the plea of *autrefois acquit* in that he had already been tried and acquitted by a court of competent jurisdiction.² The court's reason for upholding the plea was that it was in harmony with the convention, although the convention was not a part of English law and although there was no mention in it of the rule against double jeopardy. It is difficult to avoid the impression that the doctrine of double jeopardy was being used as a way out of the difficulties which concurrent jurisdiction presented.

While the *Aughet* case was preoccupying the judiciary, the problem of jurisdiction arising out of the arrival of the United States troops in England was engaging the attention of the Foreign Office. As a result of negotiations between the United States and the United Kingdom, the Defence of the Realm Regulation 45F of 22 March 1918³ was brought into operation, Sec. 1 of which stated: 'It is hereby declared that, subject to any general or special agreement, the naval and military authorities and courts of an ally may exercise in relation to the members of any naval or military force of that ally who may for the time being be in the United Kingdom all such powers as are conferred on them by the law of that ally.'

After the war constitutional developments within the British Commonwealth, culminating in the Statute of Westminster of 1931,⁴ led to the passing of the Visiting Forces (British Commonwealth) Act 1933,⁵ Sec. 1 (i) of which must be considered together with Regulation 45F, since it is modelled on the latter. The subsection provided that 'when a visiting force is present in the United Kingdom it shall be lawful for the naval, military and air force courts and authorities (in this Act referred to as "service courts" and "service authorities") of that part of the Commonwealth to which the force belongs to exercise within the United Kingdom in relation to members of the force in matters concerning discipline and matters concerning internal administration of the force all such powers as are conferred upon them by the law of that part of the Commonwealth'.

Neither Regulation 45F nor the Act of 1933 expressly provides for the jurisdictional relationship between the service courts and the local courts, but the assumption is that the jurisdiction of the local courts remains

¹ 2 & 3 Vict., c. 71.

² *R. v. Aughet*, 34 T.L.R. 302.

³ S.R. & O. (1918), No. 367, expired on 31 August 1920. See War Emergency Laws (Continuance) Act 1920 (10 & 11 Geo. V, c. 5), sec. 2.

⁴ 22 Geo. V, c. 4; see also Cmd. 3479 and Cmd. 3717, p. 26.

⁵ 23 & 24 Geo. V, c. 6.

unaffected, since rules of interpretation require that the jurisdiction of English courts cannot be ousted except by the clear words of a Statute. There is also the known hostility of the common law to any interference in the regular administration of justice by the civil courts. The overlapping of the two jurisdictions seems to be more limited under the Act of 1933, which only refers to the competence of the service courts in matters of 'discipline and internal administration', but 'discipline' is nowhere defined and the broad meaning which such a word is capable of bearing in relation to military personnel makes the limitation (if it is one) of very dubious significance. Neither Regulation 45F nor the Act of 1933 indicates any solution to the 'conflict' of jurisdictions that might arise and no provisions are made against double jeopardy.

The outbreak of the Second World War again made the question an urgent one; for Regulation 45F had expired and the Act of 1933 applied only to Commonwealth forces. Thus the United Kingdom entered into separate agreements with the exiled governments of several allied European States whose forces were present in England.¹ These followed a common form of which Appendix III of the British-Czechoslovak Military Treaty on the organization of Czechoslovakian Armed Forces of 28 October 1940 is an example. Concurrent jurisdiction is recognized implicitly in the opening provisions of the Treaty:

Article 1. 'Subject to the provisions of Article 2 below, jurisdiction in matters of discipline and internal administration over members of the Czechoslovak Land Forces in the U.K. shall be exercised in accordance with Czechoslovak Military Law, and offences against discipline shall be tried and punished accordingly by Czechoslovak military courts and authorities.

Article 2. The offences of murder, manslaughter and rape shall be tried only by the civil courts of the United Kingdom. The acts or omissions constituting offences against the law of the United Kingdom other than murder, manslaughter and rape shall be liable to be tried by the civil courts of the United Kingdom.'²

The implementing legislation, the Allied Forces Act, 1940,³ is in the now familiar form. It says that the service authorities of an allied power in the United Kingdom may exercise jurisdiction over their personnel in matters relating to discipline and internal administration. Sec. 2 (1),⁴ partially reflecting Article 2 of the Agreement, then provides: 'Nothing in the

¹ Barton, this *Year Book*, 27 (1950), p. 197.

² Schwelb, 'Jurisdiction Over Members of the Mixed Forces in Great Britain', *Czechoslovak Year Book of International Law* (1942), p. 156. For analysis of Article 2 of the Agreement and its relationship to concurrent jurisdiction see below, p. 133. See also *Official History of World War II: Grand Strategy September 1939-June 1941*, p. 264.

³ 3 & 4 Geo. VI, c. 51.

⁴ For the controversy (not strictly relevant to our purposes) as to whether this section purports to 'confer' jurisdiction on a foreign service court, see King, *American Journal of International Law*, 36 (1942), p. 557. *Contra*: Barton, this *Year Book*, 26 (1949), p. 404; and Schwelb, *American Journal of International Law*, 38 (1944), p. 58.

foregoing section shall affect the jurisdiction of any civil court of the United Kingdom to try a member of any of the naval, military or air forces mentioned in that section, for any act or omission constituting an offence against the law of the United Kingdom.' There can be little doubt that by this time any theory of 'exclusive jurisdiction' was unlikely to be accepted. We have already seen that the U.S.A. (Visiting Forces) Act, which was to come two years later, was treated as an exceptional deviation from the traditional system. After the war, concurrent jurisdiction again became the general rule and this is reflected in two important multilateral agreements, namely in Article 7 of the Agreement on the Status of Armed Forces of the Brussels Treaty Powers of 21 December 1949¹ and Article VII of the N.A.T.O. Status of Forces Agreement of June 1951.²

Chapter 2

THE PROBLEM POSED BY CONCURRENT JURISDICTION, AND ITS SOLUTION

Theoretically, if jurisdiction is concurrent there need be no conflict: each side may exercise jurisdiction. In practice, however, the situation is one which has to be regarded as involving potential conflicts of jurisdiction. Where there is concurrent jurisdiction there is the possibility of double jeopardy. There is natural abhorrence of this in all civilized legal systems and the rule against double jeopardy is, as Cassels J. in *R. v. Navratil* put it, 'a well-known elementary principle' of law. In some systems it is even raised to the level of a constitutional safeguard. Yet to solve the problem created by concurrent jurisdiction merely by using the rule against double jeopardy would be to place a premium on the accident of custody. It is natural, therefore, that though double jeopardy has prompted serious thought on the problem, and provided one of the means of solution, yet other approaches have also been tried.

No single consistent answer has been given to this delicate problem. Nevertheless, certain patterns are discernible and there appear to have been basically three approaches to its solution. We may isolate these for purposes of exposition but must guard against an exaggerated simplicity. They resist being placed in mutually exclusive, watertight classifications, and there is no clear chronological development. Moreover, the third line of solution, as will appear, is little more than a logical and coherent rearrangement of ideas and principles contained in the earlier solutions. Be that as it may, there is a considerable consensus in the underlying ideas, and despite

¹ Cmd. 7868 (not ratified by the United Kingdom).

² *United Nations Treaty Series*, vol. 199, p. 67.

the absence of specific agreement international practice reveals some basic principles that may be applicable.

The Administrative Approach

The first approach is, strictly, no legal solution at all. Concurrence of jurisdiction is tacitly admitted or expressly asserted and the rest is left to diplomatic negotiation or administrative handling. This appears to be the only solution possible under Regulation 45F, under the Act of 1933 and, to a large extent, under the Act of 1940. All these enactments are silent as to who shall exercise jurisdiction and in which cases. Therefore either court may exercise jurisdiction if the case comes before it.¹ If this approach permits flexibility in cases where public emotion is roused, the defects are obvious. There is no certainty and no assurance how a particular case will be dealt with. Nevertheless we shall see when we consider the third—the N.A.T.O.—approach that the flexibility of the administrative approach is retained while the uncertainty is removed to a great extent by the provision of certain guiding rules.

The Rule and Exception Approach

The basic idea here is to take segments from the concurrent jurisdiction and place them within the 'exclusive jurisdiction' of one party. This may be done with specific offences. An illustration of this is Article 2 of the Anglo-Czechoslovakian Agreement of 25 October 1940, Annex III,² under which the offences of 'murder, manslaughter and rape' were placed under the exclusive jurisdiction of the host State. This leaves obvious difficulties. How would a set of facts which reveal two offences, e.g. attempted suicide and manslaughter, be dealt with?³ A subtler method would be not to specify offences, but to define certain conditions or circumstances and to require that offences falling within these conditions should fall under the exclusive jurisdiction of one party.

Whichever method is adopted, this technique of allocating offences to the exclusive jurisdiction of one side is not so much a solution to the problem as an abandonment of the concurrent jurisdiction principle.⁴ It may be referred to as a 'rule' and 'exception' technique which, though familiar in legal development, is not always a happy one. It is particularly ill fitted to the problem created by concurrent jurisdiction. This is so because the problem is one of competition between two jurisdictions and here a system of 'priorities' is much more satisfactory than the

¹ See above, p. 128, n. 4.

² Schwelb, 'Jurisdiction over Members of the Allied Forces in Great Britain', *Czechoslovak Year Book of International Law* (1942), p. 156; and see above, p. 131.

³ See, e.g. the facts in *R. v. Navratil*, *Annual Digest*, Suppl. vol. 1919-42, case No. 85.

⁴ But see the qualification below, pp. 147-8.

'rule' and 'exception' technique, as will become apparent when we consider the solution adopted in the N.A.T.O. Status of Forces Agreement.

Yet it is important to examine the types of conditions or circumstances which may justify the allocation of offences into the exclusive jurisdiction of one party. This is so because, as we shall see later, even if the 'concept of priorities' used by the N.A.T.O. Status of Forces Agreement is new, yet, for purposes of deciding priority, the Agreement utilizes the 'exceptions' to concurrent jurisdiction which we are about to consider and which developed as part of this second line of solution. These 'exceptions' fall under three broad heads.

(a) *Offences committed within the camp of the visiting force*

This exception has some of its roots in the now discredited doctrine of 'extritoriality'. It finds a place in the first edition of Oppenheim in 1905 and is retained by Lauterpacht in the eighth edition. Having discussed the concept of 'extritoriality', the passage continues: '... a crime committed on foreign territory by a member of these (foreign) forces cannot be punished by the local courts or military authorities, but only by the Commanding Officer of the forces or by authorities of their home State in cases where the crime is committed either within the place where the force is stationed or in some place where the criminal was on duty.'¹ A similar concept occurs in the British Note of 5 September 1917² to the United States Ambassador in London concerning the need for some arrangement in respect of the United States forces in England, but does not find expression in the Defence of the Realm Regulation 45F which resulted from the negotiations.³ Barton has pointed out that the concept was only incidental to the negotiations.⁴ The same concept is reflected in dicta of the Egyptian Mixed Court of Cassation in *Manuel v. Ministère Public*.⁵ The accused, a member of the Free French Forces in Egypt during the last war and not covered by any specific treaty with Egypt, was charged with attempted murder, at Cairo, of one Marco Tahan, apparently an Egyptian citizen. At the time of the alleged attempt the accused was not on duty and not within his camp. The Court, in affirming the decision of the lower Court that the accused was subject to the jurisdiction of the courts of the host State,⁶ said:

'It was argued that this rule [that the accused was only triable by his own military courts and not by the local courts] applies even where, as in the present case, there

¹ *International Law* (8th ed., 1955), vol. 1, § 445.

² *Foreign Relations of the U.S.A.* (1918), Suppl. 2, p. 733.

³ See above, p. 128, n. 2.

⁵ *Annual Digest*, 1943-5, case No. 42.

⁴ Barton, this *Year Book*, 31 (1954), p. 343.

⁶ *Ibid.*, at pp. 156-7.

has been a breach of the ordinary criminal law committed outside military establishment and without the soldier being on duty at that time. . . . The principle of the immunity from jurisdiction of the armed forces in a foreign country is no longer contested so far as concerns . . . breaches of ordinary law committed within the military establishment . . . [but] . . . there exists no generally recognized rule of international law which extends the principle of immunity from jurisdiction in the case of a sojourn of foreign troops by consent, in respect of offences against the ordinary law committed outside military establishments.¹

Part of the difficulty with this exception is the uncertainty as to what is meant by offences 'within the camp'. There is no consistent definition of this expression. The Pessoa Draft Article 96 of the 6th Subcommittee of the Committee of Jurists of the Pan American Union at Rio de Janeiro in 1912 confined it to the 'precincts of the camp' (*en el racinto campamento*). However, Article 299 of the Bustamante Code, which is based on Article 96 of the Pessoa Draft, stated: 'Nor are the penal laws of a State applicable to offences committed within the area of military operations (*en el perimetro de las operaciones militares*) when it authorizes the passage of an army of another contracting State through its territory, except offences not legally connected with that army.' Again, the United Kingdom-Belgian Convention of 15 April 1916 talks of the 'exclusive jurisdiction of the tribunals of their respective armies in the field'.²

Moreover, *R. v. Navratil*³ hardly supports this exception. In that case the alleged offence was committed within the camp and exclusively concerned members of the Czechoslovakian forces in England, but the English courts exercised jurisdiction. The scope of the case is, however, more limited than appears at first sight. We have already seen, that the 'sole question' to which the learned judge addressed himself was whether the English courts had jurisdiction. Although he considered the relevant passage from Oppenheim and found it to be in his opinion wider than the 'real law' upon the subject, it can be maintained that the learned judge did not seriously pursue the other question whether, by public international law, the accused was under the circumstances entitled to immunity. He had at least two good reasons for not doing so. First, the Allied Forces Act of 1940, Sec. 2 (1),⁴ specifically stated that the English courts had jurisdiction. The case expressly turns on the plain interpretation of this statutory provision, enacted only two years previously, in the face of which the court had no option but to exercise jurisdiction. Secondly, although defence counsel raised an objection to the jurisdiction of the court, there could not have been a claim for 'immunity' by the Czechoslovakian authorities. This was so because, under the Anglo-Czechoslovakian Agreement of

¹ Ibid., at p. 161.

² See above, p. 125 and n. 7 on that page.

³ *Annual Digest*, Suppl. vol., 1919-42, case No. 85; see also above, p. 129.

⁴ See above, pp. 131-2.

20 October 1940,¹ the offence of manslaughter was placed within the exclusive jurisdiction of the English courts. A claim for immunity would have been in breach of this treaty.

Even if the import of the decision in *R. v. Navratil* is perhaps unclear, the distinction between offences committed 'within' the camp and 'outside' the camp, has very little authority to support it. It also finds no place in the N.A.T.O. Status of Forces Agreement or in current international practice. Despite the analogy of a lease, it does not seem to be reflected even in modern base agreements where the visiting forces have leases of land in States in which they are stationed.² What is more it is based on 'extritoriality', a doctrine which has been attacked by writers, rejected by judges,³ and now appears to be discredited.

Nevertheless it is possible that at the very kernel of this exception is an idea which does not draw its inspiration from the discredited doctrine of 'extritoriality'; an idea which, it is submitted, is still very much alive. The clue lies in the limitations which have been suggested to the supposed exception that offences committed 'within the camp' are within the jurisdiction of the visiting forces. Article 96 of the Pessoa draft contained one limitation: Where the offence was between two local persons, then the local courts were to have jurisdiction even though the offence had been committed within the camp. Article 299 of the Bustamente Code excludes from offences which are within the camp and within the jurisdiction of the force those offences 'not legally connected with that army'. The converse limitation on the host State appeared in the statement of Sir Donald Somervell, the then Attorney-General, on 21 August 1940, when, in the debate on the Allied Forces Act, 1940, he said: 'Although under Clause 2 (i) we do claim complete jurisdiction over all offences, in practice it is not of course claimed where an offence is committed within the lines and the life and property of one of our subjects is not involved.'⁴ Rand J.'s conclusion in the *Exemption of the U.S. Forces from Canadian Criminal Law* case⁵ is even more illustrative. Having made the distinction between offences within the camp and those outside, he formulated his view in such a way as very largely to invalidate his own distinction. He said:

'Members of the United States Forces are exempt from criminal proceedings in Canadian courts for offences under local law committed in their camp, except offences against persons not subject to the United States service law or their property, or offences

¹ See above, p. 131.

² E.g. Agreement with Annexes and Exchange of Letters between the United Kingdom and Malaya on External Defence and Mutual Assistance, 12 October 1957, *United Nations Treaty Series*, vol. 285, p. 60, esp. Annexes 3 and 4.

³ Brierly, *Law of Nations* (6th ed., 1963), p. 222.

⁴ *Hansard*, H.C., 21 August 1940, col. 1405.

⁵ *In re Exemption of the U.S. Forces from Canadian Criminal Law* (1943), 4 D.L.R. 11; *Annual Digest*, 1943-5, case No. 36.

under the local law whenever committed against other members of those forces their property and the property of their government, but the exception is only to the extent that the United States courts exercise jurisdiction over such offences.¹

It does not of course follow from Article 96 of the Pessoa draft that offences outside the camp but between members of the force are within the jurisdiction of the visiting force. But it is arguable at least that the core of the limitation in that Article is not the distinction between offences 'within' and 'outside' the camp, but between offences which have some close connection to the visiting force and those which have not. The concept may be rather of offences in which the visiting force may have some kind of interest, based possibly upon the functional needs of an army or possibly upon traditional relationship between armies and their personnel or both. It must be noted, however, that the distinction between offences within and without the camp, though a false and superficial one, may yet have helped the practice in this branch to crystallize ideas lying behind this superficial distinction. But that the distinction itself had been swept away and finds no place in current international practice, even if it ever had a place, cannot now be doubted.

Finally, reference may be made to *Chow Hung Ching and Si Pao Kung v. The King*² which came before the High Court of Australia in 1948 on appeal from the Supreme Court of New Guinea. Phillips J. sitting at first instance and on the limited reference available took the view that the accused were not entitled to any immunity because they had committed the offence 'outside the limits of their camp and upon a native inhabitant . . . and in the course of a private dispute'. The High Court of Australia affirmed the judgment of Phillips J. but on the basis that the appellants were not members of an armed force of a friendly nation. The dicta of the judgments of the High Court do not, however, give any indication that the distinction between offences within and outside the camp would have been considered as conclusive. On the contrary there is considerable emphasis on the fact that the offence was not between members of the 'force' but against an inhabitant of the host State, that the accused were 'off duty' at the time and that it was not an offence which had any particular relation to the military activities of the 'armed forces'.

(b) *Offences having some connection with duty*

Here again, after some hesitation, the basic idea seems now to be settling into a fairly clear and workable concept. We may start with Oppenheim's statement in 1905, already cited, to the effect that the military authorities of the visiting force have jurisdiction if the offence is committed in a 'place where the criminal was on duty'. As previously pointed out,

¹ (1943), 4 D.L.R. 41.

² *Annual Digest*, 1948, case No. 47; 77 C.L.R. 449; and see also above, p. 127, n. 2.

the statement is expressly posited on extritoriality, which perhaps explains the emphasis upon 'the place where he is on duty'.

The mixed courts of Egypt have contributed much to the working out of the idea and by 1942, when *Ministère Public v. Triandifilou*¹ was decided, the emphasis had clearly shifted from the 'place where' the offence was committed to the idea of 'duty'. The accused was a Greek sailor on a Greek warship, the *Panthea*, anchored in Alexandria. He went ashore on orders to purchase food for the ship and return by midnight. He got drunk and shortly before midnight in a street incident entirely unconnected with his duty he stabbed a policeman. He was charged in the local courts on two counts—(1) for the stabbing and (2) for being in possession of a dagger contrary to local law. He pleaded immunity in respect of both charges, but was convicted on both counts. There being no treaty between Egypt and Greece, the matter fell to be dealt with under principles of customary international law. On appeal, the Correctional Tribunal of Alexandria upheld the conviction on the first charge. The Correctional Tribunal held that the accused was 'off duty' at the time of the stabbing and that the local courts had jurisdiction.² On further appeal, the Court of Cassation held that the local courts of the host State did not have jurisdiction because the accused was 'on duty' at the time of the offence. The view of the Correctional Tribunal that the accused was 'off duty' was reversed.

At first sight it would appear that both the Correctional Tribunal and the Court of Cassation proceeded on the basis that if an offence is committed 'whilst on duty' then immunity follows. It is not necessary to stress the obvious defect in this line of thinking. It is quite possible, as in this very case, for an accused to commit an act quite unconnected with his duty, which act gives rise to an offence. In such a case 'duty' has no more relevance to immunity than the 'place where' it is committed. The two courts appear to have come to opposite decisions because of their differing attitudes to 'duty'. Although the Correctional Tribunal asked itself the question whether the accused was 'on duty' or not, it appears really to have had in mind a slightly different and, it is submitted with respect, a more correct question—namely 'was the offence or rather the act which gave rise to the offence committed in the course of duty'. This becomes evident when we examine the kind of fact with which the Court chose to support its decision. The Court said: '... he [the accused] was not engaged in his mission but was off duty (*hors de service*) when, in a drunken condition,

¹ *Annual Digest*, Suppl. vol., 1919-42, case No. 86.

² Conviction on the second charge was set aside on the ground that at the time the accused set out from the ship he was 'on duty' and the dagger was necessary for his duty! Since the Court of Cassation held that the accused was at all time 'on duty' the decision of the Correctional Tribunal was reversed on the first count, but affirmed on the second count.

emerging from a bar in the Place Mohamed Aly, he approached a crowd in the street. The crowd had formed around a policeman who, in the execution of his duty, was endeavouring to escort a certain actress and a taxi driver to the police station. The accused drew a dagger from his pocket and stabbed the policeman in the back.' It is unfortunate that the Court used terminology such as 'on duty' and 'off duty', when in fact it was stressing the fact that the accused's actions were completely unconnected with his duty. The approach of the Court of Cassation was more mechanical, according immunity to acts 'whilst on duty' irrespective of the connection of the act to the accused's duty. The Court held that the accused was on duty because he had not yet returned to give an account of his mission to his superior officer.¹ It went on to say that the question whether the accused was on a mission (*service commandé*) or not ought to be 'interpreted not with regard to the actions of him who has received the order but with regard to him who gave the order and who is concerned with its execution'.²

Two years later, in Brazil, the Supreme Court faced a similar problem in *Re Gilbert*.³ Here again the decision turned on general principles of customary international law, as there was no treaty between the countries concerned. Gilbert, an American marine on guard outside the American naval camp in Brazil, shot at and killed a Brazilian citizen who, when refused entry into the camp, persisted in his approach. The Court held that the American military authorities, and not the Brazilian Courts, had jurisdiction. The judgment of Falcao J. (Rapporteur) went on the basis that the homicide occurred in 'exercise of the specific duty as sentry of the camp'.⁴ De Azevedo J., concurring with the Rapporteur, said that 'the act of the sentry who was guarding the camp was directed against a person who resisted the order not to enter'. The reasoning is on correct lines and is moving towards the view that only acts which are connected with or arise in the exercise of specific duty are covered by immunity under

¹ There may well arise cases where there is no question of returning to report to superior officers and yet the question whether the act is connected with duty is at issue.

² *Annual Digest*, Suppl. vol., 1919-42, case No. 86, p. 169; see also *ibid.*, case No. 87 (*Gaitanos v. Ministère Public*), where the *Triandifilou* case was distinguished. The appellant, a Greek sailor, was convicted in Egypt for having imported a quantity of hashish for sale. It was held that the Egyptian courts had jurisdiction since it was 'not contended that the offence was committed whilst engaged in a mission under orders'. Cf. *Orfanidis v. Ministère Public*, *Annual Digest*, 1943-5, case No. 38, where the immunity of the appellant, another Greek sailor, was upheld on the identical charge but on the basis that he had 'rejoined his warship, whatever the reason might be, without having been arrested by the local authority'. It was established that the commander of the warship had handed the appellant over to the local authorities for the 'sole purpose of investigation' which the Court held did not imply 'waiver of immunity'. In this connection see Oppenheim, *International Law* (8th ed., 1955), vol. 1, § 450, p. 854.

³ *Annual Digest*, 1946, case No. 37.

⁴ He also quoted Article 299 of the Bustamante Code as a relevant factor, the offence being committed '*en el perímetro de las operaciones militares*'.

international law. It is more in line with the reasoning of the Correctional Tribunal in the *Triandifilou* case than with that of the Court of Cassation.

Indeed, it was this line of reasoning which finally gained ground in the Court of Cassation itself. A year after the *Triandifilou* case, but preceding *Re Gilbert* in Brazil, there came before the Egyptian Mixed Court of Cassation the case of *Ministère Public v. Tsoukharis*.¹ The accused, again a Greek soldier, was ordered to go from Alamein to Amrieh. Disobeying the order he went to Alexandria where he was joined by three other soldiers. In an affray one of them (Gounaris) killed a British corporal. The accused, Constantin Tsoukharis, was charged as an accessory to this crime. He pleaded that he was on duty and therefore immune. This plea was accepted by the *Chambre du Conseil* of the Tribunal of Alexandria. The prosecution appealed successfully to the Court of Cassation. On a strict interpretation of the Court of Cassation's judgment in the *Triandifilou* case, Tsoukharis must succeed, because he was on a mission and had not yet reported back. He was therefore on duty and consequently immune. The Court of Cassation freed itself from this mechanical approach by stating that a mission under orders means a mission dictated by military requirements, and that an '*abuse of a mission*' would deprive the accused of the immunity which he would otherwise have. The Court affirmed that the question must be looked at from the angle of the person who gives the order and who is interested in the report of the person sent. But if the latter is interested in prolonging the duration of his mission, he could not be said to be acting on the order. Finally the Court stressed that the question of what a person's duty was must be defined with due regard to the facts.² Acting contrary to orders is not acting within the scope of duty. Such a line of reasoning is not really concerned with whether or not an accused had returned from his mission to report to superior officers, but rather with what the scope of his duty was and whether the act giving rise to the offence was sufficiently connected with his mission. The relevant passage of the judgment of the Court reads as follows:

'Mission under orders means a mission dictated by military requirements. It does not appear from the reasons given for the decision of the Court below that such a duty existed in the present case. Furthermore, the order has to be looked at from the point of view of the person who gives it and not from the point of view of the person who receives it. Applying this principle it seems clear that the person giving the orders is interested in the report of the person sent whereas the latter is interested in prolonging the duration of the mission. If therefore there is no report to make there is no order in question and a soldier who abuses his mission to prolong his leave will cease to be

¹ *Annual Digest*, 1943-5, case No. 46.

² See *Scordalos v. Ministère Public*, *Journal des Tribunaux Mixtes* (Egypt), 19-20 May 1944, No. 3308, p. 2; Barton, this *Year Book*, 31 (1954), pp. 355-6; the delicate nature of the tasks of a secret agent gives rise to the very wide interpretation of the hours of duty.

covered by immunity from jurisdiction. In order that the Court of Cassation should be able to exercise its power of judicial review it is essential that the alleged mission should be defined with due regard to the facts.¹

The *Tsoukharis* case was followed in *Cambouras v. Ministère Public*.² The accused, a Greek soldier, was on guard duty for twenty-four hours at a time, but allowed to go home for meals after reporting to the office where he was going. The accused left at 11 a.m. without notice, and was drinking till 3 p.m. On his way back he stabbed a policeman. The Court of Cassation held that this was an 'abuse of duty' not covered by immunity. Again, in *Gougoulis v. Ministère Public*³ an indecent assault on a boy of eight was held not to be covered by immunity, the Court stressing the need to consider the particular circumstances of each case.

Barton has emphasized that these decisions constitute a reassertion after the *Triandifilou* case of the control of local courts over the question of who decides whether an accused was on 'service commandé'.⁴ If that may be true, these decisions mean more. They signify a shift from the broader yet more mechanical rule expressed by the Court of Cassation in the *Triandifilou* case to a narrower but more intelligible, subtler and more flexible principle analogous to the doctrine of scope of employment in the common law. It is acts connected with duty which are immune, not any offence whilst on duty, however unconnected with the duty.

This is the principle which is reflected in international practice today. It finds expression in the N.A.T.O. Status of Forces Agreement;⁵ in modern Base Agreements within the Commonwealth,⁶ and in the Status of Forces Agreements within the Soviet bloc.⁷ Further, such a development is analogous to, and is in harmony with, the functional approach to

¹ *Annual Digest*, 1943-5, case No. 40, p. 151. The Court held that it was not the duty of the Court of Cassation to go into the facts of the case and to decide whether the accused had 'abused the mission'; but allowed the appeal on the ground that the reasons given by the lower court were insufficient.

² *Journal des Tribunaux Mixtes* (Egypt), 26-27 January 1944, No. 3254, pp. 2-4; Barton, this *Year Book*, 31 (1954), p. 354.

³ *Journal des Tribunaux Mixtes* (Egypt), 28-29 January 1944, No. 3260, p. 3; Barton, this *Year Book*, 31 (1954), p. 355.

⁴ Barton, *ibid.*, p. 305.

⁵ *United Nations Treaty Series*, vol. 199, p. 67, Article VII, paragraph 3a (ii).

⁶ United Kingdom-Malaya, *ibid.*, vol. 285, p. 60, at p. 78, Annex 3, Sec. 1 (3) (a) (ii); see also p. 98; Treaty concerning the establishment of the Republic of Cyprus (with exchange of notes) of 16 August 1960, *United Kingdom Treaty Series*, No. 4 (1961), Cmd. 1252, Annex C, Sec. 8.

⁷ Agreements of 15 March 1957 concerning the legal status of Soviet forces temporarily stationed in the territory of the Roumanian People's Republic, *United Nations Treaty Series*, vol. 274, p. 158, Article 5 (2). Agreement on questions relating to the temporary presence of Soviet forces in the territory of the German Democratic Republic, 12 March 1957, *ibid.*, vol. 285, p. 105, Article 6 (b); cf. translation of this Agreement in *American Journal of International Law*, 52 (1958), p. 212. Agreement on the legal status of Soviet troops temporarily stationed in Poland, 17 December 1956, *United Nations Treaty Series*, vol. 266, p. 194, Article 9 (2) (b); cf. translation supplied by the Polish Embassy in U.S.A., *American Journal of International Law*, 52 (1958), p. 221. Agreement on the legal status of Soviet forces temporarily present in the territory on the Hungarian People's Republic, 27 May 1957, Article 5 (2) (b), *ibid.*, p. 217.

immunity in the law of modern international organizations and modern doctrine on immunity generally.

That there may be difficulties in the precise formulation of the principle and its application to actual situations cannot be denied, yet this need not affect the validity of the principle. In assessing practice in the international community it would be wrong to look for the same degree of linguistic exactitude as within a particular municipal system. The English translation of the Russian agreements with the German Democratic Republic and with Poland, provided by the Secretariat of the United Nations, uses the expression 'in the performance of his official duty'. Somewhat different renderings are given in the *American Journal of International Law*, which speaks of 'punishable acts while discharging their official duties' and 'offences committed while carrying out Service duties'. The N.A.T.O. Status of Forces Agreement and agreements modelled on it use a different, but more precise, formulation. These agreements speak of 'offences arising out of any act or omission done in the performance of official duty'.

The terminology of the Soviet formulations, especially the expression 'offences in the performance of official duty', may give the impression that it covers only offences ordered by the superior officer or authorized by the particular 'rule' under which an accused acts. If this very restrictive interpretation of the Soviet formulation is correct, there will be very few cases which will fall under the exception since members of a force are rarely authorized or ordered to commit offences. It is unlikely that such is the proper construction as it would rob the rule of almost all practical value. However, such an argument was urged by Japan in the *Girard* case,¹ in spite of the much clearer and less ambiguous formulation of the administrative agreement between Japan and America, modelled on the N.A.T.O. Status of Forces Agreement. Under the N.A.T.O. model it is the act or omission which must be in the performance of the official duty. If so, any offence arising from the act, even though the offence itself is unauthorized, will be covered by immunity. Thus, if a member of a force whose duty it is to drive a motor vehicle does so recklessly, his offences will be covered by immunity because they arise from acts done in the performance of his duty, even although that duty could and should have been performed without breaking the law. The formulation in the Turkish law implementing the N.A.T.O. Status of Forces Agreement is slightly different both from the Soviet formula and from that of the N.A.T.O. agreement itself. This Law, enacted on the 10 July 1956, refers to 'offences arising out of any act or omission done in the performance of official duty or done in connexion with the performance of official duty'.²

¹ Snee and Pye, *Status of Forces Agreements—Criminal Jurisdiction* (1957), p. 50.

² Law No. 6816, *ibid.*, p. 49.

The real difficulty is not the slight difference in formulation. Whatever the formulation the critical question will be 'is the act (or omission) sufficiently, directly or closely connected with the duty so that it could be said to be in the course of the duty?' The answer must depend largely on the particular facts, influenced by ideas of causation and relevance. There is no magic formula to dissipate difficulties in answering that question. This makes the subsidiary question, who decides whether an offence is connected with or arises out of an act or omission in the performance of official duty, a significant one. There are several possibilities and no uniformity in practice. The problem will be discussed in greater detail in connection with the Status of Forces Agreement concluded by the United Nations Command with Japan in relation to the Korean crisis.¹ For the moment it is sufficient to observe that there is a body of case law which suggests the rule to be that the local courts of the host State have the right to make this decision.² This will not prevent any statement by the authorities of the visiting force from being considered as evidence, and in some circumstances almost conclusive evidence, of the point.

There is of course no doubt about the rule of international law that a person carrying out an act specifically ordered as an agent of a State should not be held personally liable before courts of another State, unless the act itself is a crime under international law.³ What has been suggested above is that, apart from this issue, there is a rule of international law that members of a friendly visiting force are immune from the criminal jurisdiction of the host State in respect of an offence connected with or arising out of an act or omission in the performance of official duty. This has been distinguished from offences committed whilst on duty though unconnected with duty. In the absence of an international agreement, the local courts have the power to decide whether an act was in the performance of duty or not, but if the court forms the view that that act is in the performance of duty, and the offence arose out of it, the member of the visiting force is entitled to immunity.

(c) *Offences against certain persons or property*

This is the third possible exception to concurrent jurisdiction. Its development is more recent than the two exceptions already discussed, but there are judicial dicta of great weight as well as treaty practice to support it.

¹ Below, p. 169.

² *Ministère Public v. Triandifilou*, *Annual Digest*, 1919, case No. 86. *Re Gilbert*, *ibid.*, 1946, case No. 37. *Ministère Public v. Tsoukharis*, *ibid.*, 1943-5, case No. 40. *Scordalos v. Ministère Public*, *Journal des Tribunaux Mixtes* (Egypt), 19-20 May 1944, No. 3308, p. 2; Barton, *this Year Book*, 31 (1954), pp. 355-8; see also above, p. 137, n. 2. *Cambouras v. Ministère Public*, *Journal des Tribunaux Mixtes* (Egypt), 20-27 January 1944, No. 3209, pp. 2-4; Barton, *loc. cit.*, p. 354.

³ *McLeod case*, Moore, *Digest* (1906), vol. 2, p. 29. See also Jennings, 'The *Caroline* and *McLeod Cases*', *American Journal of International Law*, 32 (1938), p. 82.

We have already seen that British practice has been not to exercise jurisdiction where the person or property of British subjects was not involved.¹ This practice and the exception which it embodies is probably much older and more frequent than would appear from the cases in which it has been treated as a basis of immunity. Moreover the influence of this exception was noticeable in the working out of the first exception considered above.

An early example of this practice, some years prior to Article VII (3) (a) (i) of the N.A.T.O. Status of Forces Agreement, was a decision of Rand J. in *Re Exemption of U.S. Forces from Canadian Criminal Law*.² The learned judge had said: 'Members of the United States forces are exempt from criminal proceedings in Canadian courts for offences under the local law . . . wherever committed against other members of those forces, their property and the property of their government, but the exemption is only to the extent that the U.S. courts exercise jurisdiction over such offences.' In 1948, as already noted above,³ the High Court of Australia decided the case of *Chow Hung Ching and Si Pao Kung v. The King* on the basis that the appellants, not being members of any armed force, were not entitled to immunity from the criminal jurisdiction of the Australian courts. But the broader question of the immunity of visiting armed forces in general international law was examined in considerable detail by Latham C.J. and Dixon J., both of whom came to the conclusion that visiting forces were entitled to some immunity. In a less detailed judgment Starke J. took the same view, whilst the two other members of the court, McTiernan J. and Williams J., expressed no opinion. The terms in which the conclusions of these two eminent authorities, Latham C.J. and Dixon J., were formulated is significant. The Chief Justice put it thus: 'In my opinion, it is not the law that members of the visiting forces in a country with consent of the sovereign are exempt from the local jurisdiction in respect of offences committed against the inhabitants of the country, and, more especially this is not the case if those offences have no relation to the military activities of the armed forces.' Dixon J. was 'inclined to the view that a complete immunity . . . for offences committed against civilians by a member of the visiting forces while off duty and mixing with the ordinary inhabitants of the country is not to be implied from the bare permission to enter for their own purposes given by the crown to the forces of a friendly foreign power in time of peace'. It seems implicit in these statements that had the offence been between two members of the visiting force, and not one involving an inhabitant of the host State, their Lordships would have taken a different view of the matter.

¹ Statement of British practice by the then Attorney-General Sir Donald Somervell in the House of Commons on 21 August 1940, see above, p. 136.

² (1943), 4 D.L.R. 11; *Annual Digest*, 1943-5, case No. 36.

³ See above, p. 137, n. 2.

In any event, there can be little doubt that Article VII (3) (a) (i) of the N.A.T.O. Status of Forces Agreement follows this line of thought in giving the primary right to the sending State in respect of 'offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State, or of a dependant'; modern Commonwealth practice follows almost word for word the N.A.T.O. model.¹ As to the Soviet treaties, there are in all of them roughly corresponding provisions, although the scope of the provisions differs. Before examining these differences it may be useful to quote in full a relevant article from a Soviet treaty. The Soviet Union Agreement with Poland,² Article 9 (2) (a), gives the following case as one where Polish jurisdiction, i.e. jurisdiction of the host State, is ousted: the case where 'an individual serving with the Soviet armed forces or a member of the family of such individual commits a serious or lesser offence solely against the Soviet Union or against an individual serving with the Soviet forces or a member of the family of such individual'. A similar provision is found in the Soviet treaty with Hungary.³

There are, however, difficulties in extracting a common pattern from the practice. One of the important differences is that the Soviet practice leaves out any reference to 'property'. The N.A.T.O. model, on the other hand, following the line of thinking of the United Kingdom Attorney-General and of Rand J., includes in this exception cases where an offence is committed by a member of the force against the property of the sending State, or property of a member of the force, civilian component or dependant. Although it is clear that the Soviet practice does not include cases of offences against the property of persons connected with the force, it is not clear whether offences against the property of the Soviet Union are included within the exception. This doubt arises because the Soviet formulation merely talks of 'offences against the Soviet Union', and does not, like that in the N.A.T.O. model, differentiate between offences against the 'security' and the 'property' of the sending State. It is more than probable that if a member of the Soviet force steals property belonging to the Soviet Union, this would come within the notion of an offence 'against the Soviet Union'. If so, the only difference between the N.A.T.O. model and the Soviet practice on this point is that the Soviet formula does not cover the case of an offence by a member of the force against the property of another member of the force or his family.

A second difference between the different formulae is that the N.A.T.O. model is narrower than the statement of Rand J., since the offence to come

¹ E.g. United Kingdom-Malaya, *United Nations Treaty Series*, vol. 285, p. 78, Annex 3, Sec. 1 (3) (a) (i).

² *Ibid.*, vol. 266, p. 194; also *American Journal of International Law*, 52 (1958), p. 221.

³ *United Nations Treaty Series*, vol. 285, p. 217, Article 5 (b).

within the exception must be 'solely'¹ against the sending State, or 'solely' against the person or property of another member. This limitation is found in all treaties subsequent to the N.A.T.O. Status of Forces Agreement, except in one of the Soviet treaties—the agreement between the Soviet Union and the German Democratic Republic.²

Finally, whereas the N.A.T.O. model only includes within this exception offences by members of the forces or civilian components, the Soviet treaties include offences by individuals serving with the force and their families. So an offence by a dependant against another dependant will be within the Soviet, but not the N.A.T.O., exception.

The N.A.T.O. Approach

Of the two approaches already examined, the first left everything to administrative negotiation, while the second created certain exceptions to the principle of concurrent jurisdiction. A third and more logical approach is that contained in Article VII of the N.A.T.O. Status of Forces Agreement.³ The general view taken of Article VII has so far been that it was a 'radically new system', a departure from the theories of writers, and evidence that those theories did not conform to international law.⁴ But there is nothing, it is believed, which is radically new in the N.A.T.O. agreement. Article VII provides a coherent statement of the underlying principles of international practice. It consists more of a rearrangement of old ideas which affirms, rather than rejects, the evidence of earlier practice. This is not to underestimate the significance of this rearrangement. The underlying assumptions are worked out more fully and cogently, and as a result it may properly be regarded as a separate solution to concurrent jurisdiction. Although a step forward it is not a step in a totally different direction from the earlier development of the law on this subject.

Article VII begins by stating the concurrence of jurisdiction.⁵ Since jurisdiction is being 'conferred' on two sets of courts by two different legal systems, the overlapping may not be complete and, therefore, the possibility of 'exclusive jurisdiction' by either over certain offences is recognized,⁶ namely, offences punishable by one law but not the other. There is nothing new in this. There can be no doubt that a visiting force always had authority to deal at least with disciplinary offences which are not an infringement against the local law of the host State. Concurrence of jurisdiction, as we have seen, creates the problem of competition, and the

¹ See Snee and Pye, *Status of Forces Agreements—Criminal Jurisdiction* (1957), pp. 55-7.

² Cf. *United Nations Treaty Series*, vol. 285, p. 105, Article 6 (a).

³ *Ibid.*, vol. 199, p. 67, Article VII, paragraph 3.

⁴ Barton, *this Year Book*, 31 (1954), p. 370.

⁵ Article VII (1) (a) and (b).

⁶ Article VII (2) (a), (b) and (c).

more suitable answer to competing claims is, of course, a system of priorities, not the denial of the competition through the creation of a series of 'exceptions'. Article VII (3) therefore contains the idea of a 'primary right' to jurisdiction which is with the visiting force in two cases, with the host State in the others.

Even this is scarcely new. That there has not before been a statement of primary and secondary rights in so many words, as in Article VII, is true. But the two groups of cases in which the visiting force has primary rights are the same as the last two 'exceptions' which have already been considered. Instead of being bases for possible claims to exclusive jurisdiction, they now confer a primary right to jurisdiction. It may still be argued that the concept of primary right is new even though the cases in which it is granted are not. Here certain observations about what has so far been considered as the second solution become important. Although for clarity of exposition certain groups of offences have been treated as 'exceptions' to concurrent jurisdiction, this must now be qualified.

The unsatisfactory nature of such an approach has already been underlined. To claim that the starting premise is concurrent jurisdiction, but that certain offences, though punishable under both systems, are yet within the exclusive jurisdiction of one side, is really a contradiction in terms.¹ However, there is evidence to suggest that the so-called 'exceptions' were not used to exclude the jurisdiction of the host State altogether, but merely to give some sort of priority to the visiting force, the concurrent jurisdiction of the host State still subsisting.²

If the idea is that certain offences formed 'exceptions' to concurrent jurisdiction, then, logically, in those cases there could be no question of waiver. Yet it appears that waiver was possible, and that, if in those cases

¹ See Article 2 of the Anglo-Czechoslovakian Agreement of 25 October 1940, above, p. 133.

² See the converse case where under a treaty which attempted to divide jurisdiction it was held that the visiting force retained concurrent jurisdiction. *United States v. Copeland et al.*, *Annual Digest*, 1956, p. 241, a decision of the United States Board of Review, Office of Judge Advocate General of the Air Force, interpreting the agreement between the United States and the United Kingdom of Libya, signed at Benghazi, 9 September 1954, *United Nations Treaty Series*, vol. 254, p. 217, Article XX and the Memorandum of Understanding relating to criminal jurisdiction over members of the United States forces under Article XX, signed at Tripoli on 24 February 1955, *ibid.*, vol. 271, p. 431.

Article XX provided that the United States of America military authorities in Libya should have the right to exercise jurisdiction over the members of the United States forces in certain specified types of cases, and that in every such case they should be immune from the jurisdiction of the Libyan courts. Paragraph 2 of Article XX provided that 'in other cases the Libyan courts shall exercise jurisdiction unless the Government of Libya waive its right to exercise jurisdiction.' Notwithstanding this division of jurisdiction, it was held, and with respect rightly, that the United States court-martial had jurisdiction in the above case which fell within paragraph 2 of Article XX. But the court went further and stated that there was not even agreement as to who should first exercise jurisdiction in cases of this kind. If such an interpretation of the necessary intention of the parties to the treaty is correct, then the division of jurisdiction contemplated in the agreement has no meaning. The decision itself, however, may be supported on the basis that the host State never claimed jurisdiction.

where the visiting force had jurisdiction it waived its jurisdiction, the host State could exercise jurisdiction. This was expressly recognized in *Gounaris v. Ministère Public*.¹ Gounaris, a member of the Greek forces in Egypt, being charged with inflicting grievous bodily harm on a British corporal, claimed immunity on the ground that at the relevant time he was on a mission on orders. The Court, finding that at no time was any official demand made by the Greek authorities for surrender of the accused, stated:

'The rule that local courts have no jurisdiction is not absolute. Jurisdiction in fact exists all the time. . . . The question whether the jurisdiction of the authorities should be exercised or not, does not depend on personal convenience of the accused; where, as in the present case the exercise of jurisdiction by the local authorities results in proceedings and the issue of a warrant, with full knowledge of the foreign military authority, without the latter taking any steps for six months to open enquiries and to claim the soldier for its own tribunals, it must be clearly admitted (especially where the local court is already seized of the matter) that such a passive attitude on the part of the military authorities implies assent by them to the exercise of jurisdiction by the local authority. This assent cannot be withdrawn for reasons of personal convenience affecting the party concerned.'

If that is the position, then prior to the N.A.T.O. Status of Forces Agreement, when it was claimed that in certain cases visiting forces have jurisdiction, it meant only that in those cases the visiting force had some prior right or first option to jurisdiction which it could waive. Looked at in this way, the concept of primary right in paragraph 3 of Article VII is not such a new idea. The possibility of waiver, it may be noted, is expressly retained in the N.A.T.O. Status of Forces Agreement in Article VII, paragraph 3 (c). This section thus retains to some extent the part always played by administrative arrangements in the solution of these problems.

If certain offences gave the prior right to the visiting force, the question of the remaining offences arises. Yet strictly, since the starting premise is concurrence, the jurisdiction will be concurrent. It is not unreasonable to conjecture that the underlying assumption in giving prior rights to the visiting force with respect to a limited number of offences is that the prior right over the rest is vested in the host State, again subject to waiver. The real contribution of the N.A.T.O. Status of Forces Agreement is that these 'assumptions' are worked out, so that they are no longer mere conjectures.

Chapter 3

BASE AGREEMENTS

There is, finally, a group of agreements requiring special consideration because they introduce an additional and complicating factor into the relationship between visiting forces and host States. These agreements

¹ *Annual Digest*, 1943-45, case No. 41.

(which may be referred to as base or lease agreements) contemplate 'the use and occupation' by visiting forces of defined portions of the host State. The problem which is created is whether and, if so, to what extent, the jurisdictional provisions have been or ought to be influenced by the analogy of leases as compared with the normal principles governing immunities of visiting forces not having any such base agreement.¹

It has already been seen that in the early stages of the development of the practice on jurisdiction and immunity over visiting forces there was a failure to distinguish between occupying forces and foreign and friendly forces present with consent of the host State.² A much wider measure of jurisdiction was claimed for the visiting force upon the basis of a notional occupation, even though the force was not in fact an occupying force at all. With time, the problems of foreign and friendly forces present with consent were distinguished from those of occupying forces. In regard to the base agreements there appears to have been an analogous development. The tendency is to separate questions of legal title to specified areas of the host State from the question of jurisdiction and immunity of visiting forces. When, in 1940, Great Britain undertook to grant certain ninety-nine year leases to the United States of America, it was agreed that in the leases that were to be drawn up the United States would have within the area and for the period of the lease 'all rights, powers and authority' necessary for the defence and control of that area.³ There was to be a conferment of complete power within and over a specified area of the host State. However, even in the initial agreement itself there is an indication of a separation of the question of title from the question of the jurisdictional arrangements consequent upon the entry of visiting forces. This is evidenced by the fact that the agreement goes on to state that 'without prejudice to the above-mentioned rights of the U.S.A. authorities and their jurisdiction within the leased areas, the adjustment and reconciliation between jurisdiction of the authorities of the U.S.A. within these areas and the authorities of the territories in which those areas are situated shall be determined by common agreement'. The separation of these issues must not be exaggerated. The passage quoted above merely indicates that 'title' to a specified area does not necessarily imply unlimited jurisdictional power. It recognizes that there is some balancing to be done, but no clear distinction is drawn between problems of land tenure and jurisdiction.

¹ Any detailed study of leases in international law is out of place here. But see Lauterpacht's edition of Oppenheim, *International Law*, 8th ed., vol. 1, pp. 452 et seq.

² See above, p. 124.

³ Exchange of Notes regarding the grant of naval and air facilities to the United States of America in British transatlantic territories and transfer of United States destroyers to the Government of the United Kingdom, 2 September 1940, *League of Nations Treaty Series*, vol. 203, p. 202.

The following year, pursuant to this Exchange of Notes, a lease agreement was concluded whereby the United States was granted the 'use and operation' of bases in Newfoundland, Bermuda, Jamaica, St. Lucia, Antigua, Trinidad and British Guiana.¹ Article IV of this agreement deals with criminal jurisdiction, and provides in effect that the United States authorities will have the 'absolute right in the first instance to assume and exercise jurisdiction' over a member of the United States forces in respect of (1) any offence committed within the leased area, and (2) offences of a 'military nature punishable under the law of the United States' committed outside the area. Offences of a military nature are defined as 'including but not restricted to treason . . . , sabotage, espionage, or any other offence relating to the security and protection of the United States Naval and Air Bases establishment, equipment or other property or to operations of the government of the U.S. in the territory'.²

These provisions are similar to the later N.A.T.O. model in that they are wide enough to give the visiting forces jurisdiction in any case which would form the basis for the exercise of primary jurisdiction under the N.A.T.O. agreement. The definition would include the security offences under the N.A.T.O. Status of Forces Agreement and the latter part of the definition which refers to offences relating to '. . . operations of the Government of the United States in the territory' is wide enough to include offences arising out of any act or omission done in the performance of duty outside the area. Further, although the agreement is not couched in terms of primary and secondary rights as in the N.A.T.O. Status of Forces Agreement, and although it is stated that the United States authorities shall have the 'absolute' right to jurisdiction in the given cases, it is difficult to escape the conclusion that what is in substance contemplated is a set of priorities or the exercise of primary and secondary rights as in the N.A.T.O. Status of Forces Agreement. It is to be noted that the expression used is that the United States shall have 'absolute right in the first instance'. This is surely meaningless if the United States alone is entitled to exercise jurisdiction. The waiver provisions³ also give support to this contention. The waiver provisions are particularly significant because of the obligations under which the host State is placed by Article V of the agreement. By virtue of this Article the host State is obliged to pass local penal legislation to ensure adequate security and protection for the United States bases, equipment and operations with a view to making offences under the United States law in respect of these matters also offences under the law of the

¹ Agreement between the United States of America and the United Kingdom relating to naval and air bases leased to the United States, with Annexes and Exchange of Notes, 27 March 1941, *League of Nations Treaty Series*, vol. 204, p. 141; also *American Journal of International Law*, 35 (1941), Supplement, p. 134.

² Article IV (1) (a).

³ Article IV (2).

host State. This considerably enlarges the potential field of waiver. Consequently it is probable that the extent of the exercise of jurisdiction by the visiting force under this agreement in practice is not as great as the bare treaty provisions would indicate.

With this caution in mind attention may now be drawn to the respects in which Article IV is wider than the N.A.T.O. model. Not only are all offences committed by members of the force inside the leased areas within the jurisdiction of the visiting force, but this jurisdiction extends over persons other than members of the force, e.g. over the United States nationals and foreigners in the leased area. The jurisdiction thus covers British subjects (i.e. local citizens) but subject to the qualification that they must not only have committed the offence but must be apprehended within the base area. This wide jurisdiction over persons not members of the force extends also to offences of a military nature committed outside the area.

The modifications that have been effected in Article IV will be referred to later. Before that is done, a reference must be made to an agreement in 1947 between the United States of America and the Philippines under which the United States acquired the right to 'retain and use' certain bases.¹ Article XIII deals with criminal jurisdiction. The United States is given jurisdiction over members of their forces in all offences committed within the base area. Where the offence is committed outside, the visiting force has jurisdiction in the following cases:

- (1) The offended party is also a member of the force;² or (2) the offence is against the security of the United States;³ or (3) the offence is committed while engaged in the actual performance of a special military duty;⁴ or (4) the offence is committed during a period of national emergency declared by either government.⁵

Waiver of jurisdiction by either party is provided for.⁶

The cases giving jurisdiction to the visiting forces in offences committed outside the area have been stated more specifically in this agreement than in the lease agreements of 1941 between the United States and the United Kingdom. Except as regards Article XIII (4) (b), these heads of jurisdiction are very similar to the N.A.T.O. model. Article XIII (1) (b), which gives the United States jurisdiction over a member of the force when the

¹ Agreement between the United States of America and the Philippines concerning military bases, with Annexes and Exchange of Notes, 14 March 1947, *United Nations Treaty Series*, vol. 97, p. 194.

² Article XIII (1) (b).

³ Article XIII (1) (c).

⁴ Article XIII (4) (a).

⁵ Article XIII (4) (b).

⁶ Article XIII (3) and (4). There is also a provision similar to Article V of the lease agreement between the United States and the United Kingdom. See Article XV of the agreement between the United States and the Philippines.

'offended party' is also a member of the force, may be regarded as wide enough to give jurisdiction even when the offence is committed by a member of the force but against the 'property' of another member of that force. There is, however, no reference to offences against the property of the United States.¹ Here, too, the powers of jurisdiction over any offence committed by any person inside the base area find no parallel in the N.A.T.O. model.

The only qualification to this very wide power in respect of offences committed within the area under the United States-United Kingdom agreement was that the visiting authority had no jurisdiction over British subjects who committed the offence inside the area but were not apprehended therein. In comparison, Article XIII of the 1947 agreement with the Philippines introduces two further qualifications which greatly reduce the wide scope of this power. If the offence, though committed inside the area, is between two Philippino citizens, or against the security of the host State, the host State and not the visiting force has jurisdiction. Even so, it remains true that the visiting force is given jurisdiction over persons other than the members of their own force. This covers nationals of the United States, foreigners and even Philippino citizens where the offence is between a member of the force and a citizen of the host State.

Reference must also be made to one other agreement concluded prior to the N.A.T.O. Status of Forces Agreement: the agreement of 1950 between the United States and the United Kingdom for the establishment in the Bahama Islands of a long-range proving ground for guided missiles.² For several reasons it is not intended to examine the jurisdictional provisions of this treaty. Those provisions are entirely different from the N.A.T.O. model. They are unique and can hardly be considered as typical of any category of general international practice. It must also be pointed out that the work involved under this agreement appears to be of a very confidential nature and not really comparable to the ordinary case of visiting forces. The assumption that it will not form a model for any general principles governing the jurisdiction and immunities of visiting forces therefore seems reasonable.

The base agreements concluded after the N.A.T.O. Status of Forces Agreement show a tendency to bring their jurisdictional provisions into line with those of the N.A.T.O. model. An agreement was concluded between the United States and Libya at Benghazi in 1954,³ Article XX of

¹ Compare Article XIII (c) with N.A.T.O. Status of Forces Agreement, Article VII, (3) (i).

² Signed in Washington on 21 July 1950, *United Nations Treaty Series*, vol. 97, p. 194.

³ Agreement (with memorandum of understanding) between the United States of America and the United Kingdom of Libya relating to the use by the United States of certain agreed areas in Libya for mutual defence purposes, 9 September 1954, *ibid.*, vol. 224, p. 217. The agreed areas are under the exclusive use and occupation of the United States, see Articles VI and VII. See

which provides that the United States military authorities have criminal jurisdiction over members of their forces in the following cases:

1. Offences against the property of the United States Government or against the person or property of another member of the United States forces.
2. Offences solely against the security of the United States, including such offences as treason, sabotage, espionage, violation of official secrets, etc.
3. Offences arising out of any act or omission done in the performance of official duty.¹
4. Offences committed solely within the agreed area.²

It will be observed that, in respect of offences committed outside the agreed area the basis of jurisdiction is exactly the same as in the N.A.T.O. Status of Forces Agreement. Divergence still persists in respect of offences committed inside the agreed area, where a much wider measure of jurisdiction is yet retained. Nevertheless, Article XX gives the military authorities of the visiting force no jurisdiction over persons other than members of their force. There is jurisdiction neither over the nationals of the host State, nor over foreigners. To this extent and in this important respect Article XX of this agreement is narrower than earlier base agreements.³

Attention must now be turned to the modifications introduced into the base agreements between the United Kingdom and the United States referred to earlier.⁴ In 1952, soon after the N.A.T.O. agreement was signed, but even before it came into operation, an agreement was concluded between the United States and Canada, under which the N.A.T.O. jurisdictional model was made to apply to all United States forces stationed in Canadian base or leased areas.⁵ The bases other than the Canadian ones dealt with under the United States–United Kingdom agreement of 1941 cover largely the same territories as are dealt with by the agreement of 1950 relating to the establishment of a long-range proving ground for guided missiles. Consequently, modifications to the jurisdictional provisions in respect of these base areas were introduced at the same time as the

also, memorandum of understanding relating to criminal jurisdiction over members of the United States forces under Article XX (2), Tripoli, 24 February 1955, *ibid.*, vol. 271, p. 431.

¹ Article XX (1) (d).

² Article XX (1) (b).

³ Cf., for example, the United States–Philippines agreement, *United Nations Treaty Series*, vol. 97, Article XIII (a).

⁴ See above, p. 149.

⁵ Exchange of notes constituting an agreement relating to the application to the United States forces at the leased bases in Canada of the agreement of 19 June 1951 between the parties to the North Atlantic Treaty regarding the status of their forces, 28 and 30 April 1952, *ibid.*, vol. 235, p. 269. The N.A.T.O. Status of Forces Agreement was also extended to another agreement between the United States and Canada on 20 January 1958, relating to the establishment of re-fuelling facilities at the bases in Canada, *ibid.*, vol. 317, p. 35.

conclusion of the guided missile agreement and, in order to avoid a conflict of treaties, the jurisdictional provisions of the latter agreement were made to apply.¹ For reasons already noted these provisions cannot be considered as constituting any general model in international practice. Moreover, this agreement, like the guided missile agreement, ante-dated the N.A.T.O. Status of Forces Agreement.

The most complete severance of the questions of title to territory and jurisdiction over visiting forces occurs in two recent base agreements where these different issues have been worked out in great detail. These are the United Kingdom–Malay agreement of 12 October 1957² and the treaty concerning the establishment of the Republic of Cyprus of 16 August 1960.³ In both these important treaties the jurisdictional provisions are an exact model of the N.A.T.O. Status of Forces Agreements and provide sufficient evidence that the problems of jurisdiction and immunity over visiting forces need not be linked to any question of title to territory. The tendency to keep these questions separate is quite clear, and wholly correct.

PART II: CRIMINAL JURISDICTION OVER INTERNATIONAL FORCES

Chapter 4

INTERNATIONAL FORCES CONNECTED OR UNCONNECTED WITH THE LEAGUE OF NATIONS

Early Examples of International Forces Unconnected with the League of Nations

There are early instances, unconnected with the League of Nations, where forces with claims to being described as 'international' have been organized and used.⁴ Even if these are to be regarded as cases of international armies,⁵ it will be found that, apart from some general claim to extra-territorial rights,⁶ the question of privileges and immunities had been

¹ Exchange of notes constituting an agreement between the United Kingdom and the United States modifying the leased base agreement of 27 March 1941, signed in Washington, 19 July and 1 August 1950, *United Nations Treaty Series*, vol. 88, p. 273.

² *Ibid.*, vol. 285, p. 60.

³ *United Kingdom Treaty Series* (1961), No. 4 (Cmd. 1252), Annex C.

⁴ Hans Wehberg, *Theory and Practice of International Policing* (1935), pp. 15–41.

⁵ See Wehberg, *ibid.*, p. 7, on the distinction between international police and army.

⁶ *Ibid.*, p. 19.

given little or no specific thought. This may have been owing to several reasons. Sometimes the force, although placed under the control of an International Commission representing a group of States, nevertheless consisted of personnel locally recruited.¹ But even in those cases where the composition of the force had an international character the question of the jurisdictional relationship between the force and the host State does not seem to have arisen. In certain cases, as for example in the international administration of Crete (1897–1909), the visiting international force was in *de facto* occupation of the territory,² and no balancing of jurisdictional interests was called for. In the case of the international administration of Tangier, the commission in charge even had the power to, and did, enact a separate code of law applicable to all foreigners present in the host State, and special courts were created. Consequently there was no room for any actual or potential conflict of jurisdiction.³

After the First World War came a development in the idea of neutralization of an area for the purposes of a plebiscite. Prior to the war neutralization did not involve internationalization, and although the troops of the interested parties were in certain cases evacuated from the area, no international commission was set up to supervise the plebiscite, the policing of the area being done by local troops.⁴ But the development of the idea of neutralization entailed not only the evacuation of the troops of the interested parties, but also the establishment of an international commission to administer the plebiscite with complete power over the whole area. Troops from the Allied Powers were placed under these international commissions to enforce order and to ensure a free, fair and secret vote.⁵ The troops, though drawn from the inter-allied military organization at Versailles

¹ Examples are: (a) The police force attached to the Memel Harbour Board for the administration of the Port of Memel: see the convention concerning the territory of Memel of 8 May 1924, *League of Nations Treaty Series*, vol. 29, p. 87, especially Annex I (Statute of Memel Territory), Articles 5, 20, 21; Ydit, *Internationalized Territories* (1961), pp. 48–50; Wehberg, *op. cit.*, pp. 35–7. (b) The Danzig Port and Waterways Board provided for by Chapter III, Article 19 of the Paris Treaty of 9 November 1920: see *League of Nations Treaty Series*, vol. 6, p. 197; Wehberg, *op. cit.*, pp. 32–4; Ydit, *op. cit.*, pp. 48–50. (c) International administration of Tangier, where the civilian police force had an international composition being local recruits together with a European contingent half of French and half of Spanish nationals. But the armed force placed under the international administration was essentially local though with European officers: see Wehberg, *op. cit.*, pp. 12–14; Ydit, *op. cit.*, pp. 109–28; Stuart, *The International City of Tangier* (2nd ed., 1955), pp. 122–3.

² Ydit, *op. cit.*, pp. 109–27.

³ See also position in the international settlement of Shanghai (1845–1944), Wehberg, *op. cit.*, pp. 11–12; Ydit, *op. cit.*, pp. 127–54.

⁴ E.g. the plebiscite in Moldavia and Wallachia in 1857 where Austrian troops were evacuated at the insistence of France. See Sarah Wambaugh, *A Monograph on Plebiscites with a Collection of Documents* (1920), p. 106. Also in the plebiscite in Savoy and Nice in 1860, again on the proposal of France, troops of both France and Sardinia were evacuated before the vote and the militia of Savoy was alone charged with keeping order; *ibid.*, p. 86. See also Sarah Wambaugh's *Plebiscites Since the World War* (1933), vol. 1, p. 444.

⁵ See generally *ibid.*, pp. 442–70, especially pp. 446–9.

under the presidency of Marshal Foch, were entirely within the control of the respective international commissions which alone issued orders.¹

Allied troops were present at the plebiscites in Schleswig (1920),² Allenstein and Marienwerder³ (1920), Upper Silesia (1921)⁴ and Sopron⁵ (1921). At the Klagenfurt Basin Plebiscite (1920)⁶ troops were not, as such, present in the area, though fifty-eight allied officers were made available to be at the booths and at the entrances to the area on the voting day. Troops were used for the attempted plebiscite in Teschen, Spiz and Orewa (1920)⁷ though the dispute here was settled finally not by plebiscite but by direct negotiation between Poland and Czechoslovakia. The only instance where there were no provisions for allied forces at all was the attempted plebiscite at Tacna and Arica (1925-6).⁸

That the international commissions had complete power over the whole of the plebiscite area has already been mentioned. In her authoritative study on plebiscites Sarah Wambaugh observes that 'neutralization was provided in European plebiscites without reference to the question of what country at the moment enjoyed sovereignty'.⁹ For all practical purposes these international commissions were the governing authorities and the forces were their forces. They set up their own courts with exclusive competence to decide on offences against the decrees of the commissions and with powers to fine and imprison.¹⁰ In some instances even martial law was declared and military courts functioned.¹¹ There was thus no real question of the relationship between visiting forces and a sovereign host State. Without belittling in any way the contribution of these forces to the orderly conduct of the plebiscites it is pertinent to point out that these were in most instances the forces of powers recently victorious. It is true that the war had ended and the forces were technically friendly. Yet it was not an atmosphere conducive to any careful balancing of jurisdictional claims.

¹ Wambaugh, *op. cit.*, p. 448, n. 1.

² A force of 3,000 men entered on 20 January 1920. One battalion was French and one English, the Commander of the force was British (T. D. L. Sheppard). There were also present 2 cruisers and 3 destroyers from the navies of the two countries; *ibid.*, pp. 67-69, 73-74, 95, 447-8.

³ In Allenstein there was 1 British and 1 French battalion under British command. In Marienwerder a force of 700 men mainly Italian, but with one French contingent under Italian command, entered the area on 1 February 1920; *ibid.*, pp. 105, 106, 110, 113, 125-8, 132 and 448.

⁴ The maximum allied force in Upper Silesia was 20,000 of which 10 battalions were French, 2 Italian, 4 British. The force which was under French command was present in the area from 20 January 1920 to 29 June, 1922; *ibid.*, pp. 218, 220, 243, 248, 260.

⁵ The allied force 450 strong, all Italian, was present in the area from 8 December 1920 to 5 January 1922; *ibid.*, pp. 280-1, 285, 287, 290, 292 and 449.

⁶ The international commission here had representatives of the contending States on it. It had no executive functions as regards the administration of the area, and acted in a purely advisory capacity. The fifty-eight officers lent for the voting day were mainly Italian, with a few French and British; *ibid.*, pp. 180-1, 185, 196 and 448.

⁷ The allied force consisted of 1,200 French and Italian nationals. The disputing parties having been allies during the war, the troops were not allowed to shoot, thereby making the force even less effective; *ibid.*, pp. 152, 448.

⁸ *Ibid.*, p. 447.

⁹ *Ibid.*, p. 443.

¹⁰ *Ibid.*, pp. 84, 116.

¹¹ *Ibid.*, p. 249.

International Forces under the League of Nations

During the dispute between Colombia and Peru in 1933-4 over Leticia, administration of the territory was assumed by a League Commission and order was maintained by Colombian troops having a League Commander and wearing special armbands to distinguish them from the ordinary Colombian troops. There was thus no truly international force and no question of foreign and friendly troops in Colombia, so that no problems of jurisdiction arose.¹

However, in 1934² an international force, 3,300 strong and composed of contingents from the United Kingdom, Italy, the Netherlands and Sweden,³ with a League Commander of British nationality, was placed at the disposal of the Governing Commission in the Saar for the purpose of maintaining order during and after the Saar plebiscite. Since the Saar was at that time governed by the League of Nations itself,⁴ with power to legislate⁵ and to administer justice,⁶ problems of criminal jurisdiction between the League force and the host State could not arise. A local *landestrat* had been organized and frequently consulted, but in a purely advisory capacity. To have given the *landestrat* any other power would have been a breach of the Peace Treaty.⁷ Nevertheless the Council's Resolution of 11 December 1934 itself laid down in paragraph 4 that the 'command of the international force, its organs and services and the members of the said force shall be exempt from the jurisdiction of the courts of the territory'.

In *Re Polimeni*,⁸ the accused was an Italian soldier serving with the League forces who had assaulted a British corporal. The Italian military court in Rome held that the Italian military courts had jurisdiction. In the light of paragraph 4 of the Council's Resolution of 11 December 1934, the 'host State' certainly had no jurisdiction, and the dispute would appear to have really been between the Italian military, and the Italian civil courts. The court referred to the 'so-called action of territoriality' and stressed the fact that armies, being 'the supreme expression of the force upon which the sovereignty of a State is founded carry their laws and their judges with

¹ Walters, *A History of the League of Nations* (1952), vol. 2, pp. 536-40.

² Resolutions of the Council of the League dated 8 and 11 December 1934, *League of Nations Official Journal* (July-December 1934), pp. 1729 and 1761.

³ United Kingdom 1,500, Italy 1,300, the Netherlands 250, Sweden 250; see telegram from the Chairman of the Saar Committee of the Council to the Governments of the United Kingdom, Italy, the Netherlands and Sweden; *ibid.*, p. 1840, Annex 1525, Document C 548 M. 251, 1934 VII.

⁴ Treaty of Versailles, 28 June 1919, *United Kingdom Treaty Series* (1919), Section IV, Articles 45-50; see especially Article 49 and Annex to Article 50, Chapter II.

⁵ *Ibid.*, Annex to Article 50, Chapter II, paragraph 23.

⁶ *Ibid.*, Annex to Article 50, Chapter II, paragraph 25.

⁷ See generally on the Saar Plebiscite, Walters, *op. cit.*, Chapter 49.

⁸ *Annual Digest*, 1935-7, case No. 101, pp. 248-9; *Foro Italiano* (1935), part 2, p. 381.

them'. But, apart from this dictum, no question of conflict with the jurisdiction of the host State, or even of the Supreme Plebiscite Tribunal established by the League,¹ arose in this case.

Chapter 5

USE OF MILITARY PERSONNEL BY THE UNITED NATIONS OTHERWISE THAN AS ARMED FORCES

United Nations Military Observers

The United Nations has appointed commissions of observation and investigation in various parts of the world, especially where problems have arisen as a result of border violations or other armed conflict. As a general rule these groups have not been, exclusively or even predominantly, military in character. Yet in most instances military personnel have been used to varying degrees for the performance of their missions.² Military personnel thus played important roles in Palestine,³ in Kashmir,⁴ in Indonesia⁵ and in Lebanon.⁶

Both their function and their composition tend to distinguish these military observer groups from international armed forces proper. They do

¹ Established by a Resolution of the Council of the League of 4 June 1934, *League of Nations Official Journal* (January–June 1934), p. 47, this Tribunal had no jurisdiction over the military personnel of the Saar force, but only over the civilian inhabitants.

² Some United Nations commissions for observation or investigation did not use military personnel. See the Commission of Investigation concerning the Greek frontier incidents, established by the Security Council Resolution S/339 on 19 December 1946. See *United Nations Yearbook* (1946–7), p. 361. For the Commission's Report to the Security Council see *S.C.O.R.*, 2nd year, Special Suppl. No. 2, vols. 1–3, esp. vol. 1: organization of the Commission 1, Part I (B), p. 3; and methods of operation of the Commission, Pt. I (C), p. 10.

³ United Nations Truce Supervision Organization (U.N.T.S.O.) was not, strictly speaking, an independent organ but was appointed by the United Nations mediator for Palestine on the basis of Security Council Resolutions S/800 of 29 May 1948 and S/902 of 15 July 1948; see *S.C.O.R.*, 3rd year, Suppl. for May, pp. 103–4, and for July, pp. 76–7, respectively. The armistice agreements between Israel and the Arab States in early 1949 gave U.N.T.S.O. specific functions. See Egyptian–Israeli General Armistice Agreement of 24 February 1949, *United Nations Treaty Series*, vol. 42, p. 251, Article X. See also Hurewitz, 'The U.N. Conciliation Commission for Palestine', *International Organization*, vol. 7 (1953), p. 482, at p. 494, and Seyersted, 'The U.N. Forces, some Legal Problems', this *Year Book*, 37 (1961), p. 351, at p. 354.

⁴ The Military Observation Group of the United Nations Commission in India and Pakistan was established under the authority of S.C. Resolution S/726 of 21 April 1948; *S.C.O.R.*, 3rd year, Suppl. for April, p. 8. And see generally Sylvan Lourie, 'U.N. Military Observer Group in India and Pakistan', *International Organization*, vol. 9 (1955), p. 19.

⁵ United Nations Commission in Indonesia was established by S.C. Resolution S/1234 of 28 January 1949; see *United Nations Yearbook* (1948–9), p. 221. For truce agreements between the Netherlands and Indonesia, of 17 January 1948, giving military observers specific functions, see First Interim Report of the Committee of Good Offices to Security Council, *S.C.O.R.*, 3rd year, Special Suppl., No. 1, S/649/Rev. 1, of 2 September 1950, Appendix XI, p. 72.

⁶ The United Nations Observation Group in Lebanon (U.N.O.G.I.L.) was organized by the Secretary-General acting under S.C. Resolution S/4023 of 11 June 1958, *S.C.O.R.* 13th year, Suppl. April–June 1958, p. 47. See also the Secretary-General's first Report, S/4029 of 16 June 1958, on the implementation of this resolution, *ibid.*, p. 70.

not perform any kind of police or enforcement action. Their functions are to 'observe military events, to mediate and to persuade when hostile actions or other violations of a truce occur'.¹ The basic idea is to use them for preventing hostilities and supervising truces and armistice agreements. Apart from this they 'ascertain facts' (elucidate the causes and nature) of the truce or armistice breaches and provide the United Nations, or any mixed armistice commission which has been established, with an impartial account of events that occur. Although military personnel in the centre of military actions, they are armed, if at all, only for purposes of self-defence.

Their appointment and composition also show that these groups have remarkably little of the character of an armed force. The chief military observer, for example, of the United Nations Commission for India and Pakistan was appointed by the Secretary-General and in all administrative respects his status was that of a staff member of the United Nations.² When the need for military observers arose the Secretary-General or his staff negotiated with selected governments who chose the personnel on the basis of certain agreed criteria, e.g. the ability to speak a particular language or to live in a particular climate.³ The size of a group of military observers may vary, but it is quite possible that there may be only one person from any particular State at a given time.⁴ With such composition these groups cannot be compared with an organized international armed force with its own system of discipline, courts and command; such observer personnel remain military personnel of their respective countries, being merely assigned for service with the United Nations to which they report on all matters relevant to their work.⁵

However, it must be pointed out that the variety in the composition and structure of observer groups is such that the distinction between them and international armed forces proper may well be a difficult one to make. In this connection special reference must be made to a recent observer group, the United Nations Observation Mission in Yemen (U.N.Y.O.M.).⁶ This mission totalling about 200 persons was sent into Yemen to check, certify and report on the observance by Saudi Arabia and the United Arab Republic (U.A.R.) of the terms of the disengagement agreement relating to

¹ Seyersted, loc. cit., at p. 355; also Report of 8 January 1949 from the Committee of Good Offices on the Indonesian question to the President of the Security Council concerning the dispatch of military observers, *S.C.O.R.*, 4th year, Suppl. for January, p. 19, S/1193 and S/4029, paragraph 5.

² Sylvan Lourie, op. cit., p. 21.

³ Paul Mohn, 'Problems of Truce Supervision', *International Conciliation* (1952), p. 51 at pp. 60-7.

⁴ E.g. military observers group of the United Nations Commission for India and Pakistan in September 1954 had only one observer; see Sylvan Lourie, op. cit., p. 22.

⁵ Ibid., p. 23.

⁶ Established by the Secretary-General on the authority of the S.C. Resolution S/5531 of 11 June 1963.

the Yemen.¹ On the military side U.N.Y.O.M. had a reconnaissance and an air unit. The reconnaissance unit consisted of 114 Yugoslav officers and other ranks who were transferred from the Yugoslav contingent serving with U.N.E.F. The air unit consisted of about fifty officers and other ranks of the Royal Canadian Air Force. In addition to these two units there was a small military headquarters staff based in San'a and six military observers stationed in Hodeia and San'a.²

U.N.Y.O.M. personnel and aircraft were subjected to gunfire and were frequently in danger,³ and in the circumstances these units were authorized to carry arms for self-defence.⁴ U.N.Y.O.M. was therefore an exception to the normal observer group. It was armed and it was predominantly military in character. Nevertheless the operation had no peace-keeping role beyond observing, certifying and reporting and had a very much more restricted range of activity than the Truce Supervision Organization (U.N.T.S.O.) in Palestine.⁵

Turning from the character of these United Nations military observer groups to their privileges and immunities, this question does not appear to have had any systematic treatment. In the case of U.N.Y.O.M. no agreement on the status of the mission was concluded. Yet in the cases of the Lebanon⁶ and Indonesia missions⁷ special agreements regulated their status, privileges and immunities. In these two cases the model used is that of diplomatic immunity. The agreement with Lebanon specifically mentions, 'military observers', and defines U.N.O.G.I.L. as 'consisting of the three senior members, the U.N. military observers and the U.N. Secretariat'. By virtue of this definition full diplomatic status is conferred on the 'military observers in Lebanon'. The agreement with Indonesia does not advert to 'military observers' *eo nomine* but was concluded with a view to clarifying the status of the representatives on the United Nations Commission for Indonesia and the observer personnel attached to the Commission.

The status of 'military observers' who are part of a United Nations subsidiary organ serving in a host State which is a member of the United

¹ For terms of the agreement see the Report by the Secretary-General to the Security Council concerning certain developments relating to Yemen, S/5298 of 29 April 1963, paragraph 4.

² See Report by the Secretary-General to the Security Council on the functioning of the United Nations Yemen Observation Mission and the implementation of the terms of disengagement, S/5412 of 4 September 1963, paragraph 4.

³ Ibid., paragraph 8.

⁴ See Report of the Secretary-General to the Security Council (further to his Report of 29 April 1963) on certain developments relating to Yemen, S/5321 of 27 May 1963, paragraph 4c.

⁵ Report by the Secretary-General to the Security Council on the functioning of the United Nations Yemen Observation Mission, S/5412 of 4 September 1963, paragraph 7.

⁶ Exchange of letters constituting an agreement between the United Nations and Lebanon concerning the status of the U.N.O.G.I.L., New York, 13 June 1958: ST/LEG/SER. 2/10, p. 330; *United Nations Treaty Series*, vol. 303, p. 271.

⁷ Exchange of letters concerning Privileges and Immunities of the United Nations Commission for Indonesia, between the Prime Minister of Indonesia and the Principal Secretary of the Commission, 23rd May 1950: ST/LEG/SER. 3/10, p. 239.

Nations is in principle governed by Article 105, paragraph 1, of the Charter. If the host State has acceded to the General Convention on the Privileges and Immunities of the United Nations¹ then the provisions of the Convention will apply. That is the reason why in the case of Lebanon the agreement talks in terms of extending, in view of the special importance and difficult nature of the functions which the observation group has to perform, privileges and immunities 'over and above' those enjoyed under the General Convention.

The status of military observers in a host State not a member of the United Nations and where no agreement has been concluded is more doubtful. It has been suggested above that, in general, observer groups set up by the United Nations are distinguishable from armed forces.² With the possible exception, therefore, of observer groups having the composition and character of U.N.Y.O.M., it is unlikely that the personnel would be covered by the rules of customary international law relating to armed forces discussed in Part I.³ This is not to deny that observer groups may be entitled to certain privileges and immunities. There may well be an obligation on the host State to concede to a subsidiary organ of the United Nations (and of which 'military observers' may be part) such privileges and immunities as are necessary for the fulfilment of those functions of an organ of the United Nations which the State has consented to have on its territory. These privileges and immunities would, however, be based on the 'functional test' and would not necessarily correspond with those granted to visiting armed forces by customary international law.

The United Nations Guard and the United Nations Field Service

For the sake of completeness, mention should be made of the United Nations guard and the United Nations field service. The function of the guard is to maintain order and security at the United Nations Headquarters. No separate guard force exists for the United Nations missions, though in 1950 a special force of fifty was sent to Palestine to assist observers there. The field service provides technical services (e.g. transport for missions). Both groups are directly recruited by the Secretariat under Chapter XV of the Charter and do not in any way constitute an armed force. Their status, privileges and immunities will, apart from special agreement, be determined purely by their position as members of the United Nations Secretariat.

¹ 13 February 1946: ST/LEG/SER. 2/10, p. 184; *United Nations Treaty Series*, vol. 1, p. 15.

² But see Sylvan Lourie, *op. cit.*, p. 31, where it is stated that 'the international status of military observers is still very far from what some idealists would like an international army to be'. Such a view would presumably not distinguish between military observers and international armed forces.

³ Above, pp. 122-54.

*Chapter 6*INTERNATIONAL FORCES CONNECTED WITH OR UNDER
THE UNITED NATIONS

Although the presence of the United Nations Security Force in West New Guinea is one of the most recent examples of the use of international armed forces by the United Nations, it has some affinity to the League force in the Saar, and will therefore be considered first. Next the status of the United Nations forces involved in the Korean action will be examined and then the United Nations forces sent to Egypt, the Congo and Cyprus will be taken together in the last section. This division has been made purely for the purpose of considering the question of criminal jurisdiction over these forces.

West New Guinea (West Irian)

This force was present in West New Guinea as a result of an agreement between Indonesia and the Netherlands which was signed on 15 August 1962¹ and came into effect on being approved by the General Assembly on 21 September 1962.² The agreement provided for the transfer of the administration of the territory by the Netherlands to the United Nations Temporary Executive Authority (U.N.T.E.A.) established under the jurisdiction of the Secretary-General.³ The U.N.T.E.A. in turn transferred the administration of the territory to Indonesia on 1 May 1963.⁴ U.N.T.E.A.'s authority ceased at the moment of transfer of full administrative control to Indonesia. Indonesia thereafter became bound to make arrangements, with the assistance and participation of the United Nations Representative and his staff,⁵ to give the people of the territory the right of self-determination.⁶

The United Nations administrator was the chief executive officer of U.N.T.E.A. and had full authority under the direction of the Secretary-General to administer the territory, during the period of U.N.T.E.A.'s administration.⁷ Generally, existing laws remained in force, but U.N.T.E.A. had power of legislation within the 'spirit and framework' of the agreement and subject to consultation with representative councils.⁸ The United Nations constituted the first court of justice in West New Guinea on 30

¹ The agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), A/5170 of 20 August 1962; *United Nations Review*, September 1962, vol. 9, No. 9, p. 39.

² *Ibid.*, October 1962, No. 10, p. 8.

³ Agreement between Indonesia and the Netherlands, Article II.

⁴ *Ibid.*, Articles IX and XII.

⁵ They are to be appointed by the Secretary-General in consultation with Indonesia, *ibid.*, Articles XVI and XVII.

⁶ *Ibid.*, Article XVIII.

⁷ *Ibid.*, Article V.

⁸ *Ibid.*, Article XI.

November 1962 and appointed its President.¹ For purposes of maintaining law and order, and carrying out the functions contemplated in the agreement, the Secretary-General was placed under a duty to provide 'such forces as the United Nations administrator deems necessary'. On 10 November the strength of the United Nations Security Force (U.N.S.F.) was 1,596, including 1,485 Pakistanis, 12 Canadians and 99 United States Air-Force personnel.²

The Netherlands forces were repatriated as rapidly as possible but, whilst still in the territory, they were under the authority of U.N.T.E.A., not of the Netherlands.³ The Indonesian forces and Papuan volunteer corps in the territory were placed under the Secretary-General and could have been used for maintaining law and order.⁴ Indonesian forces replaced the U.N.S.F. after 1 May 1963. After the transfer of full administrative authority to Indonesia, all United Nations forces were withdrawn.⁵

If the question of sovereignty over West New Guinea during the U.N.T.E.A. administration may be complicated, both Indonesia and the Netherlands under Article 26 of their Agreement certainly agreed to apply the provisions of the Convention on Privileges and Immunities of the United Nations to 'UN property, funds, assets and officials'. The difficulty is, however, that it is very unlikely that all members of the security forces come within this Article, since they are not officials of the United Nations. On the other hand, U.N.T.E.A. being the effective government of the territory, a conflict of jurisdiction was hardly likely to arise. The Secretary-General published a General Directive concerning the force⁶ and also communicated in identical terms with the three contributing States,⁷ drawing their attention to Section 7 (e) of the General Directive which stated:

'All members of the United Nations Security Force shall be granted immunity for official acts performed in the course of their duties. In all other respects they shall be subject to the exclusive criminal jurisdiction of their national authorities. They shall be subject to civil jurisdiction for acts performed outside the course of their duties. They shall also be subject to the rules and regulations of the contingents of which they form a part without derogating from their responsibilities as part of the United Nations Security Force.'

Thus, the members of the force enjoyed both civil and criminal immunity on a 'functional' basis, based upon the criterion of 'official acts'. Criminal jurisdiction vested in the contributing State and the Pakistani Government officially notified the Secretary-General that it was in a position to exercise

¹ *United Nations Review*, December 1952 vol. 9, No. 10, p. 26.

² *Ibid.*

³ Netherlands Forces, 9,600 in all, were repatriated by 26 November 1962; *ibid.*

⁴ Article VII of the Agreement between Indonesia and the Netherlands.

⁵ *Ibid.*, Article XIII.

⁶ ST/LEG/SER. C/2, *U.N. Juridical Yearbook* (1964), p. 36.

⁷ Exchange of Letters dated 6 December 1962 and 18 April 1963, *ibid.*, p. 34.

this jurisdiction with respect to any crime or offence committed by the Pakistani contingent.¹

The Korean Action

It is not our present purpose to examine the exact extent of the connection between the United Nations and the 'Unified Command' which operated in Korea.² It is sufficient to emphasize that the action was authorized by the United Nations and that broad questions of policy, objectives and purposes were under the United Nations although the military action in the field was largely within the direction of the United States. By virtue of the Security Council Resolution of 7 July 1950³ the Unified Command used the United Nations flag and reported its actions to the Security Council. The United States was called upon by the same resolution to designate a commander of the Unified Command.⁴

The resolution of 7 July also called upon member States to assist, and recommended that all assistance should be made available to the Unified Command under the United States. Most States supplying forces or other assistance entered into direct treaty relations with the United States. These agreements governed the relationship between the forces contributed and the United States 'acting as the executive agent of the United Nations forces in Korea . . . pursuant to resolutions of the U.N. Security Council of 25 June, 27 June and 7 July 1950'.⁵ All the forces together formed the Unified Command which was established in Tokyo on 25 July 1950. It therefore becomes necessary to examine the status of these forces both in Japan and in Korea. A distinction must also be made, for reasons that will soon emerge, between the United States forces and the forces of other contributing member States of the United Nations.

(a) The status in Korea of forces other than those of the United States of America

In the agreements concluded between the contributing States and the United States of America, no reference is made to questions of jurisdic-

¹ *U.N. Juridical Yearbook* (1964), p. 39.

² On this see Guenter Weissberg, *The International Status of the U.N.* (1961), Chapter IV.

³ A/1361, *G.A.O.R.* 5th year, Suppl. 2, p. 25.

⁴ General MacArthur was appointed 'Commanding General of the military forces which the members of the U.N. placed under the unified command of the U.S.'. See Seyersted, in this *Year Book*, 37 (1961), p. 364.

⁵ E.g. agreement of 15 May 1952, between the Government of the United States of America and the Government of the Netherlands concerning the participation of the Netherlands forces in the United Nations operations in Korea, *United Nations Treaty Series*, vol. 177, p. 234. Similar agreements between the United States and the Republic of South Africa, 24 June 1952, *ibid.*, p. 241; between the United States and Norway in respect of the participation of a Norwegian mobile surgical hospital in the United Nations operations in Korea, of 17 September 1951, *ibid.*, vol. 140, p. 314; and between the United States and Sweden, of 27 June 1951, *ibid.*, vol. 148, p. 77.

tion. The forces are under the United Nations commander as the Commanding General of all armed forces of the member States of the United Nations in Korea and there is a standard Article¹ to the effect that 'orders, directives and policies' of the Commanding General issued to the force of the contributing State and its personnel shall be accepted and carried out by them as given, and that, in the event of disagreement with such orders, etc., formal protest may subsequently be presented. The question who would exercise jurisdiction within the Unified Command in respect of criminal and/or disciplinary matters is not dealt with.² It is reasonable to assume that, since these forces are properly organized armed contingents with their own national commanders, the authorities of each contributing force have jurisdiction over their own personnel. This assumption is further strengthened by the fact that this was the arrangement in respect of the later United Nations forces, all of which had much greater external cohesion as an international force than the Unified Command in Korea.³

Apart from this complex of bilateral agreements between the contributing States and the United States of America, there were no agreements between the contributing States and Korea. Nor was there any one agreement with Korea covering the entire Unified Command. Indeed, there does not appear to have been even specific consent to the entry of each national contingent, although the general consent of the Korean Republic to the United Nations action was doubtless wide enough to cover the separate national contingents. The status of the forces of the contributing States would therefore have to be determined, at least in part, in accordance with customary international law on the subject of foreign and friendly forces, although there is no known instance of the Republic of Korea's ever attempting to assume civil or criminal jurisdiction over the forces of the contributing States.

(b) The status in Korea of the United States forces

Prior to the Korean crisis itself the United States military personnel were present in Korea for purposes of assisting the Korean government in the organization and training of its own forces. They were established as a 'military advisory group' and, in January 1950, an agreement was signed between the two countries regulating its status.⁴ The group was not to consist of more than 500 officers and men and, under Article IV, the 'group and its dependents' were considered as part of the United States

¹ E.g. the Netherlands-United States agreement, *ibid.*, vol. 177, p. 234, Article 7.

² There is in Article 2 provision for conclusion of 'administrative arrangements', but this appears to be only for purposes indicated in Article 1.

³ See also *Jennings v. Markeley Warden*, below, p. 166.

⁴ Agreement relating to the establishment of a United States military advisory group for Korea, 26 January 1950, *United Nations Treaty Series*, vol. 178, p. 97. This agreement came into effect as from 1 July 1949.

Embassy in Korea for purposes of entitlement to the privileges and immunities accorded to the Embassy and its personnel of comparable rank.

The Korean crisis having created a need for armed forces in large numbers, another agreement was concluded five days after the Security Council Resolution of 7 July 1950.¹ This Agreement, which provided that 'the exclusive jurisdiction over members of the U.S. military establishment in Korea was to be exercised by Courts-Martial of the United States',² was reached prior to the establishment of the Unified Command. There was no reference either in the heading or in the body of the Agreement to United Nations forces in Korea: the Agreement related solely to the United States forces.³

There is some indication that 'exclusive jurisdiction' was claimed and granted under exceptional circumstances. The Agreement refers to the infiltration of North Koreans into the territory of the Republic and the prevailing war and states that in view of the conditions in the country the United States forces cannot be submitted to the custody of any but the United States courts-martial. Indeed, the Agreement even contemplates the exercise by these courts of jurisdiction over nationals of Korea upon the request of the Korean Republic owing to the non-existence of local courts.

Yet, in spite of this Agreement, it was argued in *Jennings v. Markeley Warden*⁴ that since the accused petitioner (who had been convicted by the United States courts-martial for the murder of a Korean while serving in Korea) was serving with the United Nations forces under the Unified Command, he was unlawfully tried by the United States court-martial. Upon an interpretation of the Charter of the United Nations, Chapter V, Articles 26 and 29 and Chapter VI, Article 36 (3), it was further contended (in a somewhat curious argument) that the accused petitioner should have been tried by the Military Staff Committee of the United Nations or by the International Court of Justice. It was held, both by the District Court and the Court of Appeal in Indiana that members of the United Nations Command in Korea remained subject to the jurisdiction of the armed force in which they served. No provision of the Charter of the United Nations placed such persons under the disciplinary jurisdiction of the United Nations or made it possible to conclude that a member of the armed forces of a member nation does not retain his status as a soldier in the army of the respective member nation. Although the United States was support-

¹ Exchange of notes constituting an agreement relating to jurisdiction over offences by the United States forces in Korea, Taegon, 12 July 1950, *ibid.*, vol. 222, p. 229.

² The military advisory group of 1949 was expected.

³ It is conceivable that the expression 'U.S. military establishment in Korea' covers at least the civilian components of the force if not the dependents of the members of the force.

⁴ U.S., D.C. Southern District of Indiana, 19 September 1960; 186 F. Supp. 612 Ct. of Appeal 7th Circuit, 7 June 1961, 290 F. 2d 892.

ing the United Nations in its efforts to restore peace and security in Korea, it was acting as a nation through the use of its armed forces.

(c) *The status of the United States forces in Japan*

When, on 25 July 1950, the United Nations Command was set up in Tokyo, it was composed almost exclusively of the United States armed forces from the Far East Command,¹ which were occupying Japan consequent upon her surrender in the war. The placing of these forces under the Unified Command pursuant to the Security Council Resolution of 7 July could not alter their status *vis-à-vis* Japan.

On the 28 April 1952 Japan became independent, and a fully sovereign equal in the international community, by virtue of a peace treaty signed between her and the Allied Powers at San Francisco on 8 September 1951.² Pursuant to Article 6 (a) of the Peace Treaty, a Mutual Security Treaty was concluded between Japan and the United States of America,³ which came into operation on the same day as the Peace Treaty. The Mutual Security Treaty provided for the continued stay of the United States forces in Japan but did not define their status, leaving this question to be determined by subsequent administrative agreements between the two governments.⁴

The purposes for which the United States forces could be stationed in Japan under the Treaty were defined in Article I. Though these were primarily the security and self-defence of Japan (which by reason of being disarmed had not the 'effective means' of exercising its own right), the Treaty also specified that the United States forces might be 'utilized to contribute to the maintenance of international peace and security in the Far East'. By virtue of this definition it was possible to make the administrative agreements on the status of forces, contemplated in Article III, apply to the United States forces placed under the Unified Command during the Korean action.

In pursuance of Article III of the Security Treaty, the first administrative agreement was concluded on 28 February 1952,⁵ but came into force on the same day as the Peace and Security Treaties. As far as jurisdiction over criminal offences was concerned, this agreement was a provisional one. The N.A.T.O. Status of Forces Agreement had been signed in London on 19 June 1951, but had not yet come into operation in respect of the United States.⁶ The administrative agreement provided⁷ that immediately upon the coming into operation of the N.A.T.O. Status of Forces Agreement the United States would conclude, at the option of Japan, an agreement on

¹ Seyersted in this *Year Book*, 37 (1961), p. 364.

² *United Nations Treaty Series*, vol. 135, p. 45.

⁴ Article III.

⁶ It came into force on 28 August 1953.

³ *Ibid.*, vol. 136, p. 216.

⁵ *United Nations Treaty Series*, vol. 208, p. 255.

⁷ Article XVII (1).

criminal jurisdiction similar to the corresponding provisions of that agreement. Pending this, the United States service courts and authorities were given the right¹ to exercise within Japan 'exclusive jurisdiction' over all offences which might be committed in Japan by members of the United States armed forces, the civilian components and their dependents, excluding those dependents who had only Japanese nationality. Such jurisdiction might in any case be waived by the United States. These provisions lasted for one and half years.² Exactly one month after the N.A.T.O. Status of Forces Agreement came into operation in respect of the United States of America, the latter concluded a Protocol with Japan whereby Article XVII of the administrative agreement was abrogated and a new Article XVII was entered into upon the N.A.T.O. model.³ This arrangement came into operation on 29 October 1953.

(d) The status in Japan of forces of other States

Until April 1952, when Japan attained full sovereignty, facilities and services were made available to members of the United Nations taking part in the Korean action by the Supreme Command of the allied Powers occupying Japan.⁴ Upon independence, the continuance of these facilities was implied in the Peace Treaty, the preamble of which registered Japan's resolve to 'co-operate in friendly association to promote . . . common welfare and to maintain international peace and security . . .' and also her 'intention to apply for membership in the United Nations and in all circumstances to conform to the principles of the Charter of the United Nations'. The facilities were assured by an agreement entered into between Japan and the United States on the same day as the Peace Treaty, under which Japan assumed, from 28 April 1952, the obligations in Article 2 of the Charter,⁵ and undertook from that day to 'permit and facilitate the support in and about Japan' of the forces engaged in the United Nations action in Korea. There was, however, no mention of what jurisdictional provisions were to govern the forces of the members of the United Nations contributing to the Unified Command and stationed in Japan. In the circumstances it is reasonable to assume that customary international law would have governed the privileges and immunities of these forces.

¹ Article XVII (2).

² April 1952–September 1953.

³ Protocol to amend Article XVII of the administrative agreement under Article III of the Security Treaty between the United States and Japan, signed 29 September 1953, came into operation on 29 October 1953; *United Nations Treaty Series*, vol. 208, p. 376.

⁴ See exchange of notes constituting an agreement between the United States and Japan relating to assistance to be given by Japan in support of United Nations actions, 5 September 1951, *ibid.*, vol. 136, p. 204.

⁵ See Kelsen, *Law of the United Nations* (1950), p. 91 on Article 2 (5) of the Charter which requires the giving to the United Nations of 'every assistance in any action it takes in accordance with the present Charter'.

There was thus a disparity in status between United States forces in Japan and the forces of other contributing members. Whilst the United States forces had 'exclusive jurisdiction' over their personnel, the other contributory forces, resting their status on customary international law, could not claim that degree of immunity. This disparity was ended by a Protocol, brought into operation on 29 October 1953,¹ between the United States of America (which signed 'acting as the Unified Command'), other contributing member States and Japan. The United Nations itself was not technically a party, but with the consent of Japan, the Protocol was open for accession by any other member of the United Nations which had sent or might send forces to fight under the Unified Command. The Protocol, which dealt only with the question of criminal jurisdiction, was an exact copy of the applicable provisions of the N.A.T.O. Status of Forces Agreement.² The only difference was that the Protocol included a set of agreed, official minutes. A general agreement on the status of United Nations forces in Japan was, however, concluded in Tokyo on 19 February 1954,³ and these provisions on criminal jurisdiction were then integrated into the general agreement.

(e) *Agreement on the status of the United Nations forces in Japan—Article XVI*

This Article of the general agreement is therefore the same as Article VII of the N.A.T.O. Status of Forces Agreement. We have already seen the broad structure of this model⁴ and attention may now be directed to some problems arising out of the formulation which it contains. It is proposed to consider three problems: first, who makes the determination of 'official duty' under paragraph 3 (a) (ii); secondly, the question of jurisdiction when one member of the force commits an offence against another member of the force but from a different contributing State; and thirdly, the interpretation of paragraph 8 of Article XVI of the agreement.

(i) *Who determines 'official duty'?* We have seen the movement in international practice towards a claim for immunity in respect of acts having some connection with duty.⁵ This claim finds expression in paragraph 3 of Article XVI:

(3). In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply:

¹ Protocol between Australia, Canada, New Zealand, the United Kingdom, the United States and Japan on the exercise of criminal jurisdiction over the United Nations forces in Japan. Signed in Tokyo on 20 October 1953, *United Nations Treaty Series*, vol. 207, p. 260.

² It is therefore in line with the Protocol between the United States and Japan which also came into operation on the same day. See above, p. 168, n. 3.

³ Agreement regarding the status of the United Nations forces in Japan, *United Nations Treaty Series*, vol. 214, p. 149.

⁴ See above, pp. 146-8.

⁵ See above, p. 137.

(a) The military authorities of the sending state shall have the primary right to exercise jurisdiction over a member of the United Nations forces or of a civilian component in relation to:

(i) . . .

(ii) offences arising out of any act or omission done in the performance of official duty.

The central idea contained in this provision has already been examined earlier in this article. It remains to consider the question of who has the right to determine whether a particular act giving rise to an offence is in the performance of official duty or not. The difficulty lies in the number of the possible situations and the lack of consistent practice. The N.A.T.O. Status of Forces Agreement is silent on the point, as also are the Soviet treaties and the agreements within the Commonwealth modelled on the N.A.T.O. agreement.

During the N.A.T.O. negotiations the possibility of arbitration was canvassed.¹ This was objected to on the obvious ground that it was inconsistent with the speed required in criminal proceedings. The validity of this objection was amply proved in the failure of the Joint Committee to reach a decision in the *Girard* case.² That the matter should be left to negotiation is open to the same criticism. In any event this is no legal solution since negotiation is always available and does not require the application of rules.

During the N.A.T.O. negotiations on the Status of Forces Agreement, the United States appears to have adhered to the position that the authorities of the sending State alone have the right to make this determination.³ There is always the fear that this would become a cover for absolute immunity or, at any rate, for extravagant claims and international practice shows that the host States are reluctant to make such a total surrender. The silence of the N.A.T.O. agreement on this point cannot be taken to mean that the sending State can decide the question unilaterally.⁴ The practice in the application of the N.A.T.O. agreement shows different types of compromise. Some States have pursued a policy of accepting the determination of the sending State, provided it has been made by particular officers—e.g. the judicial officers of the authorities of the sending State⁵ and not the commanding officer, or the highest ranking officer of the forces of the sending State in the host State.⁶

¹ Snee and Pye, *Status of Forces Agreement—Criminal Jurisdiction* (1957), p. 51.

² *Ibid.*, p. 53; see also *Japan v. Girard*, I.L.R. 28 (1958-II), p. 203, *Japanese Annual of International Law*, 2 (1958), p. 128. (In *Girard v. Wilson et al.* 354 U.S. 524, the Supreme Court of the United States held that the delivery of the petitioner for trial by Japanese authorities was not a violation of his constitutional rights.)

³ Snee and Pye, *op. cit.*, p. 51.

⁴ But see *ibid.*

⁵ E.g. France, *ibid.*

⁶ *Aide Mémoire* of 28 July 1956 between the United States and Turkey, *ibid.*, p. 52.

The claim that the sending State alone should make the determination was abandoned even by the United States in its Protocol with Japan dated 29 September 1953.¹ In the agreed official minutes to this Protocol, as in the agreed official minutes to Article XVI of the Status Agreement of the United Nations forces and in the United Kingdom Visiting Forces Act 1952² implementing the N.A.T.O. agreement, a different compromise is envisaged. The problem is approached from an evidentiary angle. The commanding officer of the sending State issues a certificate which 'shall in any judicial proceeding be sufficient evidence of the fact [of the act's having been done in the performance of official duty] unless the contrary is proved'. This, it is submitted, is easily the best approach.³ It does not hold up judicial proceedings whilst some other collateral process is worked out. It provides a check against possibly extravagant claims of a sending State without giving the host State any arbitrary power, since the contrary must be proved for a rejection of the certificate. Lastly, it leaves the final decision in the hands not of an 'officer' but of a 'court'. It is in harmony with the case law which we have considered in Part I of this study and which supports the proposition that, in the absence of an agreement to the contrary, the courts of the host State have the right to make the determination.⁴ This solution preserves that right, which, after all, reflects a fundamental principle that a court has an inherent right to decide its own jurisdiction.⁵

(ii) *Jurisdiction where the offence is between members of the force from different contributing States.* *Re Polimeni*⁶ is the only actual illustration available of an offence committed by a member of a force of one contributing or sending State against a member of another contributing or sending State in the territory of a third State. Assuming that there is a principle of international practice under which an offence committed by a member of a visiting force against the person or property of another member of that force is immune, then it is possible to argue that such a rule is sufficiently analogous to cover the case of a member of a force committing an offence against a member of another contingent forming part of the same international force. As against the host State the international force is treated as

¹ See above, p. 168, n. 3.

² 15 & 16 Geo. VI and 1 Eliz. II, Ch. 67, Sec. 11 (4).

³ Cf. the approach to the similar problem in respect of tortious claims. See agreement regarding the status of the United Nations forces in Japan, loc. cit., Article XVIII, paragraphs 3 and 4.

⁴ See above, p. 143, n. 1.

⁵ This solution also has the advantage of not impugning rules in the host State such as Article 318 of the Criminal Procedure Code of Japan by which the local court is required to decide all questions of fact.

⁶ *Annual Digest*, 1935-7, case No. 101; *Foro Italiano* (1935), Part 2, p. 381. See also above, p. 157. It is assumed that in *Re Polimeni* the accused was not committing an act in the performance of his duty.

one unit and the division of jurisdiction within the force is a matter for the force, not for the host State. The host State cannot look behind the external status of the force and into its internal structure.

Paragraph 3 (a) (i) of Article XVI runs contrary to such a view:

(3). In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the sending State shall have primary right to exercise jurisdiction over a member of the United Nations forces . . . in relation to:

(i) Offences solely against the property or security of that State or offences solely against the person or property of another member of the force of that State . . .

Under this provision when the victim of the offence is not from the same State as the accused, the host State will have primary jurisdiction.

If the argument for granting primary jurisdiction to the sending State in the circumstances of paragraph 3 (a) (i) is that the visiting force is primarily concerned, clearly the reasoning does not hold good when the offence is not one exclusively between its own personnel; as, for example, where armed forces operating under N.A.T.O. are distinct and do not have the character of a single international force. On the other hand, if a force is externally of an international character then it is indeed arguable that the rationale for the primary claim of the visiting force subsists since, *vis-à-vis* the host State, the international force is a single coherent force and not a collection of separate national contingents. To this extent the use by the United Nations of the N.A.T.O. model in their Status of Forces Agreement with Japan is somewhat unfortunate. This may be due, however, to the fact that United Nations forces in Korea and Japan, though having a more international status than the N.A.T.O. forces, were still not as truly 'international' as the forces in Egypt, the Congo and Cyprus were later to be. The agreements concluded by the United Nations with Egypt, the Congo and Cyprus were entirely different, as will be seen later.¹ However, if in the future, and in different circumstances, the more sophisticated structure of Article XVI is preferred for an United Nations force, a slight modification of paragraph 3 (a) (i) might be desirable to emphasize the unitary character of the international force *vis-à-vis* the host State.

(iii) *The interpretation of paragraph 8.* This paragraph provides:

'Where an accused has been tried in accordance with the provisions of this Article either by the authorities of Japan or by the military authorities of a sending State and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the territory of Japan by authorities of another State the government of which is a Party to this agreement. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of the rules of

¹ Members of the United Nations forces in Egypt, the Congo and Cyprus were granted complete immunity from the criminal jurisdiction of the host State.

discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of Japan.'

The problems raised by the two sentences can be considered separately as they embody two distinct thoughts. The first states the rule; the second states an exception, the scope of which can give rise to difficulty. The content of the rule is very similar to the plea *autrefois acquit* (or convict) in the common law. A person who has been tried and acquitted or convicted for an offence cannot be tried again for the same offence.¹ The reason for the rule is the sense of injustice and abuse in permitting a person to be tried more than once for any alleged offence; and the need for finality is even more acute in a sphere which admits and stresses the concurrence of jurisdiction.

Even under the rule, however, if a member of a visiting force is tried in the host State, he may subsequently be tried for any offence which is not 'the same offence'. The test for determining what is meant by the 'same offence' therefore becomes important. In a sense the offence can never be the 'same'; for here the two offences arise under different legal systems. Yet it is clear that the rule purports to prohibit a second trial for an offence which would be the same had it been in the same legal system. The point resembles double jeopardy in municipal law.² The question which the courts seem to ask themselves, at least in the common law countries, is not whether the accused has already been tried for the same *act*, but whether he has been put in jeopardy for the same *offence*. A single act may give rise to two offences. If each requires proof of an additional fact, not required in the other, then the offences are not the same.³

The difficulty is the existence in the military codes of most nations of rather broadly defined, amorphous offences which are based on breach of discipline or actions bringing discredit to the force.⁴ In such cases the method of comparing the offences should be to examine the gravamen or essence of the charge. Once the essence of the charge is distilled then the test suggested above should be applied. In practice, it will be quite easy to invoke the existence of some new element of proof in the second trial

¹ Paragraph 8 is designed to prevent double jeopardy only within Japan. There is nothing to stop a member of a force tried once being put on trial again for the same offence outside Japan. The reason for this is that the agreement is dealing with the problem of concurrent jurisdiction within the host State. It is not an attempt to afford a member of a force protection in his own State.

² There may also be an analogy in decisions on whether the trial of an extradited criminal is for the same offence for which he has been extradited. See *R. v. Corrigan* (1931), 1 K.B.D. 527. Also Halsbury, *Laws of England* (3rd ed., 1956), vol. 16, pp. 582-3, Sec. 1210.

³ Archbold, *Criminal Pleading Evidence and Practice* (35th ed., 1962), pp. 149-60. *Graviero v. U.S.*, 220 U.S. 338 (1910); 55th ed., 489. *Carter v. McClurg*, 183 U.S. 367 (1902); 46th ed., 236. Snee and Pye, *Status of Forces Agreements—Criminal Jurisdiction* (1957), pp. 74-9 and cases cited therein.

⁴ E.g. Army Act, 1955, 3 & 4 Eliz. II, Ch. 18, Secs. 64, 66, 69.

and thereby avoid the safeguard in paragraph 8. When the task is the comparison of offences to see how similar or dissimilar they are, it is difficult to enumerate a simple test. It is a field in which courts have to maintain a delicate balance. When the problem is projected from a strictly judicial environment into a treaty between States, without ready recourse to judicial process, the difficulties are immeasurably greater.

Two possibilities suggest themselves. The first, suggested by the Canadian representative at the N.A.T.O. negotiations on the Status Agreement (and adopted by some visiting forces), has been formulated as follows:¹

'The policy which is the basis of paragraph 8 would seem to be aimed at preventing a second trial for the same 'act' for which the accused has been prosecuted rather than to allow prosecution for a technically different offence arising out of the same act. Consequently the question should be whether the accused has been tried once for his illegal course of conduct.'

Such a test may simplify the matter.² Nevertheless, although the approach to the problem of double jeopardy adopted in municipal law may not necessarily be the right one in international law, it remains true that the Canadian suggestion is totally different from the municipal law doctrine. It is also difficult to assert confidently that the suggested test is the 'policy which is the basis of paragraph 8' in view of the rejection of the Canadian proposal. It is also the fact that legislation, at least in the United Kingdom, implementing paragraph 8 maintains the common law approach.³

The alternative suggestion assumes the retention of the traditional approach, based on similarity of offence rather than identity of act, but calls for the inclusion in a treaty of a provision similar to Section 4 (2) of the Visiting Forces Act, 1952. This provides that, if in a trial for a different offence it appears that conviction is 'wholly or partially' for an act in respect of which the accused has already been convicted, the court shall have regard to the sentence of the first court in determining its own sentence.

It is the phrase '. . . where an accused has been tried . . . he may not be tried again . . .' which brings us to the other problem in the rule in paragraph 8, namely the meaning of and the difficulties created by the expression 'tried'. In order to understand this, it becomes necessary to refer briefly to the setting of the expression in the broader context of Article XVI.

Where a State has primary jurisdiction it has logically only two options. It may exercise jurisdiction or it may not. If it decides not to exercise jurisdiction it is under an obligation to notify the authorities of the other

¹ Snee and Pye, *op. cit.*, p. 79.

² The 'same act' test can, however, be problematical. E.g. after trial for driving under the influence of alcohol, a subsequent charge can be brought for drunkenness under the military law; see Army Act, 1955, Sec. 43.

³ Visiting Forces Act, 1952 (15 & 16 Geo. VI and 1 Eliz. II) Ch. 67, Sec. 4 (i).

State.¹ Then the State for whose benefit the waiver takes place can exercise jurisdiction. This is not specifically stated, but it is clear not merely from the spirit of the agreement but also from the fact that jurisdiction is concurrent and that the State with secondary rights has jurisdiction although secondary. The State having primary jurisdiction, if it decides upon its exercise, will have to decide what course of action ought to be taken, having regard, of course, to its own legal system. It may either decide to 'try' the person concerned, or not to try him; for the question whether to prosecute or not is distinct from the question whether to exercise jurisdiction or not. It is possible to answer the latter question in the affirmative and the former question in the negative.

Where the person concerned is actually put 'on trial', i.e. put through a process commonly known as judicial, no difficulty arises. An attempted subsequent 'trial' will certainly violate paragraph 8 if it is in respect of the same offence. Yet on the wording of Article XVI difficulties can arise where the State with primary jurisdiction, whilst claiming its exercise, does nothing at all or decides not to prosecute. If in such circumstances a prosecution is brought in the courts of the other State, it is arguable that paragraph 8 constitutes no bar. A decision not to try a person is not a trial.² As distinct from such expressions as 'the exercise of jurisdiction',³ paragraph 8 uses narrow and legally technical expressions. It uses concepts of trial, acquittal, conviction and sentences. Proceedings before a 'court' are clearly envisaged, so that, unless the decision not to prosecute is itself arrived at by way of a trial (a judicial proceeding) it will not be a bar under paragraph 8 to a trial in the other State.⁴ *A fortiori* it follows that this is so where the State with primary jurisdiction does nothing at all or turns a blind eye to the alleged offence.

¹ Article XVI, paragraph 3 (c).

² See Snee and Pye, *op. cit.*, p. 79.

³ This expression in paragraph 3 (c) may have the wider significance of State sovereignty.

⁴ Cf. *Whitley & Aitchison*, the Court of Cassation, France, I.L.R. 26 (1958-II), p. 196, where it was held that, if a State with primary jurisdiction waived its jurisdiction, the right of that State to exercise jurisdiction was incapable of being revived, notwithstanding that the State in whose favour jurisdiction was waived had decided not to prosecute the person concerned. This decision may be construed as turning on the scope and extent of the particular waiver. The lower court had held that the waiver of the right of primary jurisdiction did not imply a waiver of the right subsequently to exercise jurisdiction if, as in this case, the alleged offender had not been tried by the State in whose favour jurisdiction had been waived. The Court of Cassation, in reversing this decision, took the view that if the State 'which has the right of primary jurisdiction decides to waive *this right*, there arises a genuine lack of competence for the benefit of the other State which was not entitled to the right of primary jurisdiction. The State which has waived its right can no longer exercise jurisdiction unless the State which benefits from the waiver decides not to exercise jurisdiction and notifies the State which has waived its right' (*italics supplied*). It is difficult, however, to see how a 'genuine lack of competence arose', if what was waived was merely the right to primary jurisdiction. If, on the other hand, the waiver was of all rights to jurisdiction, then, the above quotation from the judgment of the Court of Cassation is unfortunately worded.

One writer has argued¹ that the above reasoning will 'force' the State with primary jurisdiction to prosecute, even though under its laws there is no case for prosecution. In other words that it will force the State with primary jurisdiction to violate its laws and to abuse its judicial machinery in the interest of political expediency. It has, however, to be assumed that the State with primary jurisdiction will make its decision in accordance with its laws and would not manipulate them so as to forestall the other State from exercising rights which it has under the treaty.

It might well be that the intention of the agreement was that, once the State with primary jurisdiction 'deals' with the matter, then the same matter cannot form the basis of any action in the other State. If so, it would have been much clearer to have formulated paragraph 8 in broader terms than that of 'trial'. If that was the intention, then it would be desirable to re-draft paragraph 8 to read: 'Where a State has not expressly waived its primary jurisdiction in respect of any act, such act may not form the basis of the exercise of jurisdiction within Japan by any of the other contracting parties.' There is some support for interpreting Article XVI to mean that, even if a State with primary jurisdiction does absolutely nothing about the matter, the authorities of the other State cannot entertain an action in the absence of waiver.² Otherwise, the secondary jurisdiction would become primary jurisdiction, and this would be inconsistent with the treaty. Put in another way, the argument is that primary jurisdiction is not conditional upon the courts of the other State being actually seized of the case. The assumption here is that paragraph 8 is not the only bar to the exercise of jurisdiction by a State with secondary rights. Even if there has been no 'trial' in the State with primary jurisdiction, unless there is a waiver the secondary rights cannot be exercised.

Such an interpretation really deprives the secondary rights of all value, unless there is a waiver. A State with primary jurisdiction may, by doing nothing at all, prevent the State with secondary rights from exercising its jurisdiction and thereby place those rights in indefinite suspense. This would result in there being no difference at all between stating the rules on criminal jurisdiction through a system of priorities and the more traditional statement that, in certain circumstances, a foreign visiting force has complete immunity subject to waiver. This interpretation would mean that the State

¹ Schuck, 'Concurrent jurisdiction under NATO Status of Forces Agreement', *Columbia Law Review*, 57 (1957), p. 355, at pp. 367-8.

² *Re Gadois*. Decision of the French Court of Appeal, Paris, 14 December 1953, I.L.R. (1953), p. 186. In a case where a visiting force under N.A.T.O. had primary jurisdiction it was argued in the courts of the host State that such primary jurisdiction was conditional upon the authorities of the force actually exercising jurisdiction. This argument was rejected, the court holding that the existence of primary jurisdiction was not conditional in the way suggested. The only exception to it was waiver. The case is distinguishable on the basis that the visiting force insisted on their prior right and it was therefore not a case where nothing was done.

with primary jurisdiction could use its right so as to give a complete immunity from criminal trial which was not intended by the Treaty.

From the difficulties of interpreting the rule, we must now turn to the difficulties of the exception:

‘. . . However nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its forces for any violation of rules of discipline arising from any act or omission which constituted an offence for which he was tried by the authorities of Japan.’

Before considering the basic problem raised by this exception or qualification to the rule in paragraph 8, a preliminary point may be made. This provision, whatever its scope, can operate only in favour of the sending State. If the sending State ‘tries’ an offender under the provisions of Article XVI there can be no question of retrial by the host State. On the other hand, where the host State has ‘tried’ him, there can arise the question of a ‘trial’ by the authorities of the force for a violation of the rules of discipline. The question is, what is the scope of this power of the military authorities?

One interpretation suggested is that although a person ‘tried’ once cannot be ‘tried’ again for the same offence, nevertheless ‘non-judicial’ action can be taken against him.¹ It is submitted that this cannot be a correct view. If this view is correct, there is no need for the second sentence of paragraph 8. Nothing in the statement of the rule in the first sentence prevents the military authorities from taking administrative action; the member of the force concerned could be dismissed from service or reduced in rank if this could be done administratively. If, through an abundance of caution, the intention was to state this specifically in the second sentence, the treaty would hardly have used the expression ‘. . . nothing in this paragraph shall prevent the military authorities . . . from *trying*² a member of its force . . .’. The verb ‘to try’ is used four times in the paragraph and it has been suggested that in the other three instances it envisages court proceedings. It is unlikely that, in the fourth instance, the same expression should be used differently.

It therefore seems reasonable to assume that what the second sentence does mean is that though a member of a force has been ‘tried’ once in the host State, the military authorities may ‘try’ him again. If so the critical question is, for what offence? What, in other words, is meant by ‘violation of rules of discipline’?

Offences against discipline could not mean merely those offences, such as absence without leave or desertion, which are offences only against the law of the sending State. Had it been so, the second sentence of paragraph

¹ Snee and Pye, *Status of Forces Agreement—Criminal Jurisdiction* (1957), p. 87.

² Italics supplied.

8 would be redundant and in a sense self-contradictory. It would be redundant because acts punishable by law of the sending State only are within the exclusive jurisdiction of that State.¹ It would be self-contradictory because the second sentence itself states specifically that it refers to cases where the member of the force had already been tried by the host State and therefore must refer to cases where the act in question is an offence under the law of the host State as well. On the other hand, there is the view that 'offences against discipline' could include all offences punishable under the military law of the sending State, which might bring in all or most of the offences punishable by the law of the host State. If so, it would turn the rule in paragraph 8 into a 'one way street'.² There would be no double jeopardy rule as far as the sending State is concerned. It would always be free to prosecute. Such an interpretation would rob the host State of the benefit of paragraph 8 and, if such a drastic effect was intended, it would surely have been stated. Accordingly, this interpretation ought not to be accepted without strong arguments to support it.

First, it has been urged that all offences committed by military personnel in a foreign country bring discredit on their force and are therefore prejudicial to good discipline. Even so, this is no argument, because the question is whether the expression 'violation of the rules of discipline' could have been intended to have such a wide meaning in this context. It is more an assertion that the words ought to be widely construed than an argument why they should be so construed. In any event the argument does not seem universally true. It could hardly be said, for example, to violate rules of discipline if a member of the force were to render himself liable to prosecution in the host State for a parking offence. Secondly, it has been argued that if the sending State is allowed by paragraph 8 to court-martial a member of the force who has been convicted in the host State by taking him outside the territory, there is no reason why it should not be allowed to do so within the territory of the host State. This reasoning is specious; for what happens outside the host State is really no concern of the host State. The object of the treaty was not to give a member of the force any protection from his own State but to regulate concurrent jurisdiction which might arise within the host State. Lastly, it is said that a member of a force should not receive under the treaty any greater benefits than he would receive in his home country. Hence if the host State had not given the punishment which the sending State would have given in similar circumstances, there ought to be a chance of doing this by trying him again. This is looking at the treaty from a narrow municipal point of view. It might equally be argued that a member of the force ought to be 'compensated' if the punishment imposed on him by the host State is more excessive than what he would have received at home.

¹ Article XVI, paragraph 2 (a).

² Snee and Pye, *op. cit.*, p. 82.

These arguments seek to justify a drastic interpretation of the 'disciplinary offences' under consideration. Neither extreme view is satisfactory. Offences against discipline mean more than those offences such as desertion but cannot mean all offences over which there is concurrent jurisdiction. It is very difficult to suggest any legal test as to what it means or where the line is to be drawn. Since such uncertainty hardly adds anything of value to the rule in paragraph 8, it might have been better for the paragraph to have ended with the statement of the rule and to have permitted, by inference, the taking of administrative action alone against a member of the force who has been tried in the host State.

United Nations Forces in Egypt (U.N.E.F.), the Congo (O.N.U.C.) and Cyprus (U.N.F.I.C.Y.P.)

These three United Nations forces were essentially different from the force in Korea. They differed as to function, since they were of a 'peace-keeping' character quite distinct from the character of the Korean force which, based on the Security Council Resolutions of 25 and 27 June 1950, was more akin to that of the 'enforcement' forces originally contemplated in Chapter VII of the Charter. Even more important, for present purposes, was the difference in organization. Starting from the pattern established for U.N.E.F., these three forces were organized, controlled and commanded by the United Nations, although using national contingents. This tended, almost inevitably, to dictate quite different solutions to the problems of their States within the host States. In the event, as we shall see, the customary international law on friendly visiting forces was given little scope for application.

(a) Status of the United Nations forces prior to the conclusion of agreements

In all three cases the United Nations troops went in with the consent of the host State, but prior to any agreement on the status of the forces; and in all cases agreements were subsequently entered into. The agreement with Egypt consisted of an exchange of notes between the Secretary-General and Egypt on 8 February 1957.¹ In the case of the Congo, a basic agreement was initialled on 29 July 1960,² while on the 27 November 1961 a formal agreement³ was signed determining the details of the application of the

¹ Exchange of letters constituting an agreement concerning the status of the United Nations Emergency Force in Egypt, of 8 February 1957, *United Nations Treaty Series*, vol. 260, p. 61: ST/LEG/SER. B/10, p. 295. The agreement was approved by the General Assembly in Resolution 1126 (XI) of 22 February 1957.

² Doc. S/4389/Add. 5; *S.C.O.R.*, 15th year, Supplement July–September, p. 27.

³ Agreement relating to the legal status, facilities, privileges and immunities of the United Nations Organization in the Congo (Leopoldville), of 27 November 1961, *United Nations Treaty Series*, vol. 414, p. 229.

basic agreement and was given retrospective effect as from the date of entry of the force.

Similarly, the exchange of letters between the Secretary-General and the Government of Cyprus of 31 March 1964¹ was given retrospective effect to 14 March 1964, the date of arrival of the force.

It must not be assumed that in the case of U.N.E.F., and pending the conclusion of the 1957 agreement, no legal provisions governed the force. When the first contingent of the United Nations forces landed on Abu Suweir airfield on 15 November 1956, Egypt was a member of the United Nations and was a party to the General Convention on Privileges and Immunities.² Moreover, under Article 105, paragraph 1, of the Charter, the organization enjoys in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purpose. This provision covers the 'force' itself which is a 'subsidiary organ' of the United Nations, but whether it gives any immunities to the individual members of the force is doubtful. The host State might contend that the exercise of its criminal jurisdiction, even in a considerable number of cases, would not interfere with the efficiency of the force as such, and would not contravene Article 105 (1).

Article 105, paragraph (2), extends this functional immunity to 'representatives of the members of the United Nations' and to 'officials of the Organization'. The General Convention on Privileges and Immunities adds a third category—'experts on missions for the U.N.'.³ However, the members of a 'force' do not appear to be covered by any of these categories. Not being directly recruited by the United Nations under Chapter XV, they remain national contingents under their own officers and in the pay of their own governments, though subjected to the over-all command of the Commander of U.N.E.F., and through him of the United Nations. Only the Commander of U.N.E.F., appointed by the General Assembly,⁴ and personnel of the Secretariat assigned to U.N.E.F. Headquarters appear to come within these provisions.

The General Convention (Article IV, Section 16) provides that the expression 'representatives' shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegates. Clearly the expression does not contemplate members of the forces serving with the United Nations. Nor can such members be referred to as 'experts'. Yet it would be a surprising conclusion if the members of the forces serving under the United Nations should, until the conclusion of an agreement with

¹ *United Nations Juridical Yearbook* (1964), pp. 40–50: ST/LEG/SER. C/2.

² *United Nations Treaty Series*, vol. 1, p. 15: ST/LEG/SER. B/10, p. 184. Egypt acceded to the convention on 17 September 1948.

³ Article VI.

⁴ G.A. Resolution 1000 (E.S.-1) of 5 November 1956.

Egypt, be completely within the jurisdiction of the Egyptian courts. In the absence of any specific agreement, it is believed, the rules of customary international law might be considered to apply. Alternatively, the United Nations might conceivably argue that the distinction between the force and its members is unreal, that Article 105, paragraph 1, of the Charter extends the functional immunity not merely to the force as an entity but to the members of the force as well. However, the general provisions of this article could scarcely suffice to govern the many and intricate questions of the status of the force.

In the Congo the situation was different. When the troops entered, the Congo was not a member of the United Nations, although a few days previously the Security Council had recommended the Republic for admission to membership.¹ The articles of the Charter or General Convention therefore had no relevance. Again, one possible solution would be the application of customary international law. The breakdown of the administration in the host State, however, makes the Congo situation so different from other cases of friendly foreign troops in host States that this solution would be difficult to accept in practice. If it were accepted, however, what principles would govern criminal jurisdiction? A firm answer is difficult. The basic agreement between the United Nations and the Republic of the Congo dated 29 July 1960 which was initialled, though not signed, affords some guidance.² In paragraph 1 of that agreement the Government of the Republic of the Congo stated that, in the exercise of its sovereign rights with respect to any question concerning the presence and functioning of the United Nations force in the Congo, it would be guided in good faith by the fact that it had requested military assistance from the United Nations and by its acceptance of the resolutions of the Security Council of 14 and 22 July 1960. It likewise stated that it would '... accord the requisite privileges and immunities to all personnel associated with the activities of the Force'.

The binding nature of the basic agreement was never disputed. But even assuming that there had been no agreement at all, it is still possible to argue that members of the United Nations force in the Congo would have been entitled to immunity—an immunity which would have been complete. In his initial statement to the Security Council regarding the request by the Congo for United Nations military assistance, the Secretary-General stated: 'Were the Security Council to act on my recommendation I would base my actions on the principles which were set out in my report to the General Assembly on the conclusions drawn from previous experience in

¹ Resolutions of the Security Council of 7 July 1960, Doc. S/4377, *S.C.O.R.* 15th year, Supplement July–September, p. 9. The Republic of Congo was admitted to membership of the United Nations in September 1960.

² *Ibid.*, p. 27, Doc. S/4389/Add. 5.

the field.’¹ In his report to the General Assembly (which was based on the U.N.E.F. experience), having referred to the question of criminal jurisdiction as raising a number of points of ‘basic policy’, the Secretary-General had stated that the members of the force should be immune from the criminal jurisdiction of the host State because ‘it is essential to the preservation of the independent exercise of the functions of such a force’.²

In the Congo there was an additional reason why the ‘requisite immunity’ should be absolute immunity. The principle of good faith, which was a principle of the U.N.E.F. experience,³ would be violated if, in view of the completely chaotic situation in the host State, the Republic of the Congo had not granted the immunity which was afforded to the United Nations forces in Egypt in circumstances where internal administration was functioning in perfect order. Any possible doubt was put at rest, however, by Article 48 of the formal agreement signed on 27 November 1961,⁴ which made the provisions of that agreement retrospective.

The situation in Cyprus was more comparable to that in Egypt than to that in the Congo: Cyprus was a member State of the United Nations and a party to the General Convention on Privileges and Immunities of 1946.

(b) *The agreements*

(i) *Subjection of the force to the local law.* All three agreements emphasize the duty to obey the laws of the host State. Article 6 of the agreement with Egypt requires that

‘members of the Force and U.N. officials serving with the force shall respect the laws and regulations of Egypt and shall refrain from any activity of a political character in Egypt and from any action incompatible with the international nature of their duties or inconsistent with the spirit of the present arrangements. The Commander shall take all appropriate measures to ensure observance of these obligations.’

Article 1 of the Congo agreement is in almost identical terms. It applies both to the members of the force and to officials of the United Nations and the same word ‘respect’ is used. It is unlikely that this means anything less than to ‘obey’. The duty to obey is clear from the last sentence of the Article, which refers to the ‘observance of these obligations’.⁵ The phrase ‘... inconsistent with the spirit of the present arrangements ...’ has been omitted from the Congo agreement. It is doubtful, however, whether there is any significance in this especially in view of the principle of ‘good faith’ referred to in the previous section. Paragraph 1 of the agreement with

¹ Ibid., 873rd meeting, 13–14 July 1960, Doc. S/PV. 873, paragraph 28.

² Summary of study of the experience derived from the establishment and operation of the Force. Report of the Secretary-General, *G.A.O.R.*, 13th year, Annexes, Agenda item 65, p. 8, Doc. A/3943, paragraph 136.

³ Ibid., paragraph 157.

⁴ See above, p. 179, n. 3.

⁵ See also agreement with Egypt, Article 11, with the Congo, Article 9, and with Cyprus, paragraph 11, which deal with ‘offences ... committed’.

Cyprus is to the same effect, although it restores the phrase 'or inconsistent with the spirit of the present arrangements'.

(ii) *Definitions*. The agreement with Egypt defines a 'member of the force' as 'any person other than a person resident in Egypt, belonging to the military service of a State serving under the Commander of the U.N.E.F. either on the U.N. Command (Headquarters Staff) or with a national contingent', and as 'any civilian placed under the Commander by the State to which such civilian belongs'.¹ Paragraph 1 of the Cyprus agreement is similar except that it does not exclude persons resident in Cyprus.

The definition is not altogether satisfactory. Although it attempts to distinguish between military and civilian service, between service at the Headquarters and service in national contingents, these distinctions seem irrelevant. The test appears to be simply whether a person² has been placed under the Commander by the State contributing to the United Nations force. The expressions 'serving under', 'placed under', probably mean 'bound to accept the orders of' the Commander. Under this test the Commander himself does not fall within the definition. His privileges and immunities are separately regulated³ and it must be observed that he is an official of the Organization (having been appointed directly by the General Assembly in the case of U.N.E.F.). Yet difficulties can arise⁴ under the U.N.E.F. Agreement because the expression 'Commander' is defined to include not merely the Commander of U.N.E.F. but 'other authorities of the forces designated by him'.⁵ This may be a person, e.g. a commander of a national contingent, who is bound to accept the order of the Commander of U.N.E.F. and therefore within the definition of 'a member of the force'. 'Officers' serving with the United Nations Command *prima facie* ought to come within the definition of a member of the force, but they too are dealt with separately under Article 25.⁶

Two categories are clearly outside the definition. These are 'officials' of the United Nations Secretariat assigned to the force, and locally recruited personnel. Their privileges and immunities are dealt with separately.⁷

The agreement with the Congo likewise distinguishes between different personnel connected with the operations⁸ but contains no definitions. Some definitions are found, however, in the regulations for the United Nations force in the Congo which were issued by the Secretary-General

¹ Article 1.

² Not being resident in Egypt, in the case of the U.N.E.F. Agreement.

³ Articles 24 and 25 of U.N.E.F. Agreement; paragraphs 25 and 28 of U.N.F.I.C.Y.P. Agreement.

⁴ See below, p. 187.

⁵ Article 2.

⁶ I.e. officers of the Commander's Headquarters staff; see Article 25. *Quaere*, other officers—are they to be treated as 'members of the force'?

⁷ Article 24 of U.N.E.F. Agreement; paragraph 24 of U.N.F.I.C.Y.P. Agreement.

⁸ E.g. members of the forces, officials, local personnel (Articles 27 and 28), employees of the United Nations (Article 29); private domestic servants of officials (Article 29); liaison officers (Article 42).

on 15 July 1963, and were intended for the most part 'to continue in effect the policies and practices which have been followed in respect of the force since it first came into existence'.¹ Article 5 (e) of these regulations defines a member of the force as the 'Commander and any person belonging to the military services of a State serving the Commander'.

This definition differs from the U.N.E.F. and U.N.F.I.C.Y.P. definition in two respects. First, it excludes civilians of a contributing State placed under the Commander. This is because the Congo operation, unlike U.N.E.F. and U.N.F.I.C.Y.P., had a civilian side to it, distinct from the military and responsible directly to the Officer-in-Charge of the entire operation. Secondly and more significantly, the Commander was treated as a member of the force.

(c) *Jurisdictional provisions*

(i) *Members of the force.* Article 11 of the agreement with Egypt provides that 'members of the force shall be subject to the exclusive jurisdiction of their respective national States in respect of any criminal offences which may be committed by them in Egypt'. Article 9 of the agreement with the Congo and paragraph 11 of the agreement with Cyprus are in identical terms.

These Articles, though not directly formulated in terms of immunity, provide members of the United Nations force with absolute immunity in respect of criminal offences committed in the host State. The character and composition of the United Nations forces have hitherto been such that there is no one military code and no one set of courts-martial applicable to the force as a whole. The possibility of a vacuum of jurisdiction, which might have arisen in the circumstances, is recognized and avoided by the formulation which establishes *vis-à-vis* the host State the competence of the national authority of each contributing State over members of its contingent.

The responsibility in the largely overlapping field of 'discipline and good order' of the forces lies, however, with the United Nations under all three agreements. For example, Article 14 of the agreement with Egypt² provides: 'The Commander shall take all appropriate measures to ensure maintenance of discipline and good order among members of the force.' Article 13 of the U.N.E.F. regulations³ also in a sense reflects this, when it says: 'The Commander of U.N.E.F. shall have general responsibility for the good order of the force.'⁴ The context of these Articles indicates that they refer

¹ ST/SGB/ONUC/1. The regulations had retroactive effect and were deemed to have come into operation on the date of the arrival in the Congo of the first element of the force.

² Agreement with the Congo, Article 12.

³ Issued on 20 February 1957, ST/SGB/UNEF/1; ST/LEG/13/10, p. 314; see also regulations for the United Nations force in the Congo, 15 July 1963, ST/SGB/ONUC/1, Article 13.

⁴ Although the word discipline is omitted, it is so linked to 'good order' that the omission is, it is submitted, without significance. Responsibility here is more likely to be the responsibility to the Secretary-General.

primarily to police action; but failure to punish a member of the force after an offence is committed, it may be urged, is equally against discipline and good order and therefore a neglect of the responsibility owed by the United Nations to the host State. In the discharge of this responsibility, and in the face of the lack of competence of the United Nations to exercise jurisdiction over members of the force who commit offences in the host State, the United Nations has sought to place not merely the power but the obligation to do so in the national authority of the respective contributing State.

Having stated the 'general responsibility' of the Commander for good order of the force, Article 13 of the U.N.E.F. regulations goes on to place the 'responsibility for disciplinary action in the national contingents provided for the force with the Commander of the national contingents'.¹ The obligation is crystallized in the agreements concluded between the United Nations and contributing States² by which the Secretary-General has sought and received assurances that the contributing State will be able and prepared to exercise the necessary disciplinary action and jurisdiction.³ The difficulty of this solution is that what may be a crime in the host State may not be a crime under the law of the contributing State. If so, the contributing State is under a duty to pass such internal legislation applicable to its armed forces serving with the United Nations as may be necessary to enable it to discharge the obligations it has undertaken by virtue of its agreement with the United Nations.⁴ The available information is that, even in respect of the Congo operation where no comparable agreements were concluded between the United Nations and the contributing States, the latter have been ready to punish offenders and have found little difficulty in doing so.⁵

¹ Similarly in the Regulations for the United Nations force in the Congo, 15 July 1963, ST/SGB/ONUC/1, Article 13.

² E.g. exchange of notes constituting an agreement between the United Nations and Finland, 21-27 June 1957, *United Nations Treaty Series*, vol. 271, p. 135. For references to similar agreements between the United Nations and other contributing States see ST/LEG/SER. B.10, p. 310, n. 2. No comparable agreements between the United Nations and contributing States were made in respect of the Congo operation, but the U.N.E.F. precedent was returned to with U.N.F.I.C.Y.P.: see exchange of letters between the United Nations and Sweden, reproduced in Seyersted, *United Nations Forces* (1966), Annex 3.

³ The relevant part of the standard letter sent to contributing States by the Secretary-General of the United Nations is as follows: '... This immunity from jurisdiction of Egypt is based on the understanding that the authorities of the participating States would exercise such jurisdiction as might be necessary with respect to crimes or offences committed in Egypt by any member of the force provided from their own military services. It is assumed that participating States will act accordingly. ... I should appreciate your assurance that the Commander of the national contingent provided by your government will be in a position to exercise the necessary disciplinary authority. I should also appreciate your assurance that your government will be prepared to exercise jurisdiction with respect to any crime or offence which might be committed by a member of such national contingent.'

⁴ The extension of the laws of the contributing State to exercise jurisdiction over offences committed by their forces abroad is not inconsistent with any rule of international law. See *Mohamed Mohy-ud-Din v. The King Emperor*, *Annual Digest*, 1946, case No. 40, p. 94.

⁵ United Nations Information Release of 25 January 1962, p. 5, statement by Mr. Ivan Smith.

The weak link is between the responsibility of the United Nations to the host State and the responsibility of the contributing State to the United Nations. All that is specified is that 'reports concerning disciplinary action shall be communicated to the Commander of the U.N.E.F. who may consult with the Commander of the national contingent and if necessary with authorities of the participating State concerned'.¹ Apart from this the Commander of the force has no power of discharging the duty under which he is placed *vis-à-vis* the host State. True, the contributing State has been placed under an obligation to take disciplinary action, and to exercise jurisdiction in respect of offences committed. But if it does violate this obligation owed to the United Nations, then the United Nations might automatically be considered to have violated its obligations to the host State.

It may be possible to argue that the obligation or responsibility of the United Nations is merely to take 'all appropriate measures'² to ensure discipline and good order and that by securing from the contributing State the undertaking that it will exercise jurisdiction in respect of crimes the United Nations has discharged its obligations *vis-à-vis* the host State. This thesis would be particularly cogent if it could also be argued that the duty owed by the contributing State is owed (and the correlative right to insist upon the duty is available) not only to the United Nations but to the host State as well. There are some considerations which might support such a line of argument. In the exchange of notes between the United Nations and the contributing State, the Secretary-General refers to the fact that immunity of the members of the forces from jurisdiction of the host State was based 'upon the understanding' that the contributing State would exercise jurisdiction. The contributing States in sending troops to serve in a host State on such terms may be taken to confirm this understanding *vis-à-vis* the host State. Such an understanding, it can be contended, forms a basic assumption in this field even under customary international practice and is inherent in the basic notion of concurrent jurisdiction. Further, the relevant articles in the status of forces agreements with the host State do not talk in terms of immunity, but rather in terms of the 'exclusive jurisdiction' of the national authorities of the contributing States. These are all factors which indicate that the duty may be owed to

See also *The Times*, 8 February 1962, for the statement in the House of Commons by a Government spokesman to the effect that the United Nations had assured the British Government that O.N.U.C. personnel guilty of offences had been punished (also in *Hansard*, H.C., vol. 671, col. 741, 7 February 1962).

¹ U.N.E.F. regulations, Article 13; also regulations for the United Nations force in the Congo, 15 July 1963, ST/SGB/ONUC/1, Article 13; regulations for the United Nations force in Cyprus, No. 13.

² Article 14 of the agreements with Egypt and Cyprus, and Article 12 of the agreement with the Congo; see above, p. 184.

the host State. But it must be borne in mind that there is no specific treaty provision which unequivocally binds the contributing State to the host State, and certainly one writer has recently taken a view contrary to the one expressed above.¹

If there is no immunity from liability² but merely from process or jurisdiction, waiver ought to be possible. All three agreements state that these jurisdictional provisions have been made having regard to the special functions of the force and to the interest of the United Nations and not for the personal benefit of the persons concerned.³ There are, however, no provisions for waiver and the question as to who can waive the immunity where a member of the force commits an offence in the host State is somewhat doubtful. It is arguable that the United Nations has not the power, since it has no jurisdiction over the matter. It is also unlikely that the member of the force has any power to give himself up to the authorities of the host State, since the immunity is not his personal immunity but that which protects him as a member of, and for the benefit of, an armed force. If so, it most probably lies with the authorities of the contributing State. This conclusion draws some support from the agreements between the United Nations and the contributing States under which, as we have seen, a duty to exercise jurisdiction may be said to have been cast upon the respective national authority. The purpose of such a duty is to bring to book the offender, and the obligation might therefore be effectively discharged by waiving the immunity in favour of the host State. Indeed this may be the only way in which such an obligation can be discharged if the laws of the contributing State do not extend to cover an offence committed by a member of their forces serving abroad.

(ii) *Commander and officers*. 'The Commander' as a category of military personnel serving in the United Nations force is contemplated in all three agreements. Officers as a category are dealt with in the agreements with Egypt and Cyprus. We have already seen that the expression 'Commander' in the agreement with Egypt is not confined to the Commander of the U.N.E.F., but comprises authorities designated as 'Commander' by him. There is no similar provision in the Congo agreement or in the Cyprus agreement.

Before turning to the actual provisions in respect of these two categories, it is necessary to observe a difficulty caused by definitions in the case of U.N.E.F. This arises in respect of 'officers' and those persons designated as 'Commanders' by 'the Commander' of the force.⁴ Both these classes of persons could be treated as 'members of the force', as they would satisfy

¹ Seyersted, *United Nations Forces* (1966), p. 102.

² See agreements with Egypt, Article 6; with the Congo, Article 11; and with Cyprus, Article 5.

³ See agreements with Egypt, Article 10; with the Congo, Article 11; and with Cyprus, Article 10.

⁴ The difficulty arises only under the agreement with Egypt.

the definition of the latter considered above.¹ In regard to many of the provisions of the U.N.E.F. Agreement it seems that they must be considered as falling within that definition. For example, it may be maintained that Article 6 of the Agreement binds both classes to obey the laws of the host State. Again, Article 22 provides that 'members of the force' may possess and carry arms while on duty in accordance with their orders, or under Article 21 'members of the force' shall normally wear the uniform prescribed by the Commander. These provisions surely cover 'officers' and those authorities designated as 'Commanders' by the Commander of the U.N.E.F. Yet it would appear that, although for these purposes they may be treated as 'members of the force', their privileges and immunities are separately dealt with and, for this purpose, they cannot be treated as 'members of the force'.

Article 25 of both the agreement with Egypt and that with Cyprus provides as follows:

'The Commander shall be entitled to the privileges, immunities and facilities of Sections 19 and 27² of the Convention on the Privileges and Immunities of the United Nations. Officers serving on the United Nations Command (the Commander's Headquarters staff) are entitled to the privileges and immunities of Article VI³ of the Convention on the Privileges and Immunities of the United Nations. Subject to the foregoing, the United Nations will claim with respect to members of the force only those rights expressly provided in the present or supplemental arrangements.'

By virtue of Section 19 of the Convention on Privileges and Immunities of the United Nations, the Commander is equated to the Secretary-General and all Assistant Secretaries-General and will be accorded the complete immunity of a diplomat under international law.⁴

The Congo agreement makes no separate provision for the Supreme Commander of the United Nations force. However, his status may be regulated on several possible bases. He may be treated as a 'member of the force'. The agreement distinguishes military personnel from officials serving under the United Nations, but does not separate the former on any hierarchical basis. Such an argument is now reinforced by the definition of 'a member of the force' in the regulations for the United Nations force in the Congo which expressly includes the Commander.⁵ Against such an equation stands the fact that it would place the Supreme Commander within the exclusive jurisdiction of his national State. Such a position is not consistent with his appointment by the Secretary-General and his inter-

¹ See above, p. 183.

² These refer to the diplomatic privileges accorded to representatives of States.

³ This refers to the privileges of experts on missions for the United Nations.

⁴ Section 27 of the General Convention, referred to in Article 25 of the agreement with Egypt, does not deal with criminal jurisdiction.

⁵ See regulations for the United Nations force in the Congo, 15 July 1963, ST/SGB/ONUC/1, Article 5 (e).

national status. It would therefore be more appropriate for him to be treated *vis-à-vis* the host State as an 'official' serving under the United Nations, although in a military capacity. Finally, in spite of the definition in the regulations, it is still possible to treat him *vis-à-vis* the host State on the same level as the Commander of the U.N.E.F., and thereby to attract Sections 19 and 27 of the General Convention. The justification for such a view would be that wherever a lacuna exists the principles applied to U.N.E.F. ought to apply.¹ Here it may also be observed that the basic agreement between the United Nations and the Republic of the Congo, under which the Congo undertook to be guided by good faith in according the 'requisite' immunity to 'all personnel associated with the activities of the force', has not been abrogated or replaced by any other agreement.

With respect to 'officers', Article 25 of the U.N.E.F. and U.N.F.I.C.Y.P. Agreements attracts Article VI of the General Convention. By virtue of this 'officers' would be treated as 'experts on missions for the United Nations' and, as such, entitled to more limited immunity for the independent exercise of their functions during the period of their mission. This means more specifically immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission.²

Like 'members of the force', 'the Commander' and 'officers' have a duty to obey the law of the host State,³ so that the question of waiver becomes relevant. Article 25 of the U.N.E.F. and U.N.F.I.C.Y.P. Agreements, applying to the Commander, does not cite or refer to the waiver section of the General Convention.⁴ However, in respect of 'officers' these provisions of Article 25 of the Agreements attract the whole of Article VI of the General Convention, including the waiver provisions.⁵ In spite of this omission in respect of the Commander, since his immunity is from

¹ See the initial statement by the Secretary-General to the Security Council on the request by the Congo for military assistance from the United Nations; *S.C.O.R.*, 15th year, 873rd meeting, S/PV 873, paragraph 28. Also the report of the Secretary-General on the summary study of experience derived from the establishment and operation of U.N.E.F., *G.A.O.R.* 13th year, Annexes, Agenda item 65, Doc. A/3943.

² On the question who decides whether the act in question was in the performance of their mission, see below, p. 193.

³ I.e. the Commander and officers are to be treated as members of the force for purposes of Article 6 of the agreement with Egypt.

⁴ Section 20 of the Convention on Privileges and Immunities of the United Nations, *United Nations Treaty Series*, vol. 1, p. 15: 'Privileges and immunities are granted to officials in the interest of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In case of the Secretary-General the Security Council shall have the right to waive immunity.'

⁵ Article VI, Section 23, places the right to waive in the Secretary-General, and a duty to do so where in his opinion the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

jurisdiction and not liability under the law, the power to waive must be presumed to exist.

It is unlikely that the State of which the Commander is the national can waive his immunity, even though the application of Section 19 of the General Convention brings in an analogy to a 'diplomatic envoy'. Such a position is not compatible with his important independent international status. Nor is it likely that the Commander himself can waive his immunity of his own volition, because the immunity is not personal to him. The application of Section 19 of the General Convention to him as an 'official' of the Organization raises the difficulty of whether he is to be treated as the Secretary-General or an Assistant Secretary-General. This is relevant because, if he is to be equated to the former, the power of waiver would probably be with the Security Council,¹ and, if equated to the latter, the Secretary-General would probably have the power of waiver. In view, however, of his position as a subordinate of the Secretary-General, taking orders from the latter, it would be more appropriate to treat him as an Assistant Secretary-General. The Commander of O.N.U.C. was in an even more subordinate position to the Secretary-General than the Commander of U.N.E.F., because between the O.N.U.C. Commander and the Secretary-General was the representative of the Secretary-General, later called the 'Officer-in-Charge' of the Congo operation. It would seem, therefore, that the Secretary-General would have had the power to waive the immunity attached to the Commander of O.N.U.C.

The Secretary-General is normally under a 'duty' to waive the immunity of any 'official' in any case where in his opinion the immunity would impede the course of justice and can be waived without prejudice to the interest of the United Nations. The question may arise whether he would be subject to a similar 'duty' in the case of the Commander. However, it may be argued that the exclusion of the waiver section, when dealing with the status of the Commander as distinct from an 'officer', if it has any significance, would negative any such 'duty' in the Secretary-General. On the other hand, it could equally be argued that a 'duty' might arise from a different source. The principle of 'good faith' in all questions relating to the presence and functioning of the force in the host State is applicable to the United Nations as much as to the host State.² Non-

¹ It should be noted that the Commander of the U.N.E.F. was appointed by the General Assembly. The Supreme Commander of the United Nations forces in the Congo was appointed by the Secretary-General, as was the Commander of U.N.F.I.C.Y.P.

² See paragraph 2 of the *aide-mémoire* on the basis for the presence and functioning of the United Nations Emergency Force in Egypt, which is annexed to the Secretary-General's Report on this subject, *G.A.O.R.*, 11th year, Annexes, Agenda item 66, Doc. A/3375; noted with approval by the General Assembly on 24 November 1956 in Resolution 1121 (XI), *ibid.*, Supplement No. 17, Doc. A/3572, p. 61. See also summary study of the experience derived from the establishment and operation of the U.N.E.F.: Report by the Secretary-General, *ibid.*, 13th year, Annexes, Agenda item 65, Doc. A/3943, paragraphs 132-3.

waiver in the circumstances considered above might thus be regarded as a violation of good faith.

(iii). *Officials*. In a national army the military and administrative or civilian components can be neatly welded together. The civilian component is generally regarded as part of the force, which is composed of all personnel who are in the employ of the armed service of that particular State.¹ Persons in the employ of any other body are not a part of the force. The situation is different in the case of United Nations forces composed, as was the case in Egypt, the Congo and Cyprus, of distinct national contingents. The fusion of civil and military activities has been the responsibility of the United Nations² and, for this purpose, the United Nations has injected into the operation members of the Secretariat to discharge the many administrative and organizational duties that have arisen.

All three agreements deal with the privileges and immunities of these 'officials',³ as distinguished from the members of the force. In the United Nations operations in Egypt, even officials were under the Commander of the force.⁴ Yet that did not make them members of the force, because they were not military personnel. Nor were they civilians in the service of any national contingent placed under the Commander.⁵ Officials, though civilians, when placed under the Commander are members not of national contingents but of the Secretariat, and remain so.⁶ There is no military law applicable to them. In the Congo officials were even more clearly distinguished from the members of the force, since they were not placed under the Commander of the force but under the Chief of the United Nations civilian operations. This post, which did not exist in Egypt or in Cyprus is in 'rank and authority' the 'opposite number of the Supreme Commander of the United Nations force as chief of the military activities.'⁷

The immunity to which officials are entitled under all three agreements⁸

¹ See e.g., definition of Civilian Component in NATO Status of Forces Agreement, *United Nations Treaty Series*, vol. 199, p. 67, at p. 70.

² See paragraph 84 of the summary study on the experience derived from the establishment and operation of U.N.E.F., *G.A.O.R.*, 13th year, Annexes, Agenda item 65, A/3943.

³ As a category it enters into a Status of Forces Agreement for the first time in the agreement between the United Nations and Egypt.

⁴ The Commander of the U.N.E.F., unlike the Supreme Commander of the United Nations forces in the Congo, was the head of the United Nations action in the field. He functioned as the 'Principal Agent of the Secretary-General' and combined therefore the leadership of the force with the role of 'representative of the U.N.'; see summary study on the experience derived from establishment and operation of U.N.E.F., *G.A.O.R.*, 13th year, Annexes, Chapter IV, paragraphs 75-7 and 84-7.

⁵ See last part of the definition of 'members of the force', above, p. 183.

⁶ See Article 42 of the agreement with Egypt.

⁷ See paragraph 6 of the Memorandum by the Secretary-General on the Organization of the United Nations Civilian Operation in the Republic of the Congo, Doc. S/4417/Add. 5, *S.C.O.R.*, 15th year, Supplement for July, August and September, at p. 61; also Table I at p. 66.

⁸ Agreements with Egypt and Cyprus, Article 24, attract Articles V and VI of the Convention on Privileges and Immunities of the United Nations; agreement with the Congo (Article 9) gives the substance of the immunity without reference to the General Convention.

is a functional immunity in respect of all acts performed by them in their official capacity. However, it is arguable that the Congo agreement obscures this principle. The provision which follows the statement of immunity casts a certain doubt on the right of the host State to exercise jurisdiction in cases where offences arise from the unofficial acts of United Nations officials. Article 10 provides, in effect, that where the unofficial act of an official gives rise to a criminal offence, the host State shall refrain from prosecuting until after the completion of a prescribed procedure.¹ This procedure is as follows:

'If the authorities of the Government (of the Congo) possess evidence that an official . . . has committed an offence against the penal laws of the Republic of Congo, all such evidence shall be communicated to the Special Representative of the Secretary-General, who shall conduct any supplementary inquiry necessary to obtain evidence. The Government and the United Nations will then arrive at an agreement as to whether the international organization should institute disciplinary procedures within the terms of its appropriate regulations, or whether the Government should institute legal action. Failing an agreement, the matter shall be submitted to arbitration at the request of either party.'²

The question, or as it is put in the above clause 'the matter', for arbitration is, presumably, whether the Government of the Congo ought to institute legal action, or whether it is a matter for the international organization by way of its own disciplinary proceedings. The answer must depend on whether the act giving rise to the offence was committed in an official or unofficial capacity. This is so because it is a reasonable, though admittedly not an imperative, interpretation of Article 9 of the Congo agreement that acts performed in an unofficial capacity are subject to the jurisdiction of the host State. Should that division of jurisdiction be ignored, it is difficult to see what principles could govern this question. If, in view of the chaotic internal situation in the Congo, a greater degree of protection for officials was intended, it would surely have been simpler to provide for absolute immunity in the agreement.

On the other hand, it may be a more reasonable interpretation to argue that the substantive right of the host State to exercise jurisdiction in the circumstances is not denied by Article 10, which merely imposes a procedural condition prior to such exercise of jurisdiction. What is being arbitrated is not whether the host State has a 'right' under the agreement to exercise jurisdiction in cases of offences arising from the unofficial acts of officials, but whether, assuming the host State has this right, it is not a case more suitable for disciplinary action by the United Nations. Article 10 merely allows the possibility of waiver by the host State to be explored.

¹ There is, however, no denial of the substantive right of the host State to exercise jurisdiction in such circumstances.

² Agreement with the Congo, Article 10 (a).

If this interpretation is correct the arbitration decision cannot, in the absence of agreement between the parties, be considered to amount to a final and binding decision, because the host State must retain its rights under the agreement if no satisfactory arrangement is arrived at. Arbitration under Article 10 is not arbitration upon a 'dispute . . . concerning the interpretation and application of the agreement', contemplated under Article 46. Consequently the provisions of this latter Article cannot be regarded as applicable.

The provisions in the agreements for determining whether an act was committed in the performance of official duty or not remain to be considered.¹ None of the agreements specifically states what is the competent body to decide this issue. Two separate questions then arise, the first of which is, who ought to decide what the competent body should be? Article 39 of the agreements with Egypt and Cyprus supplies the answer to this question. It provides that in the event of a difference between the United Nations and the host State which 'involves a question of *principle*² concerning the Convention on Privileges and Immunities of the U.N.', a settlement shall be sought in accordance with Section 30 of that Convention. This latter Section provides for an advisory opinion of the International Court of Justice, to be accepted as binding between the parties. This question (who should determine what is the competent body to decide whether an act was in the performance of official duty or not), it may reasonably be argued, involves a question not of detail but of 'principle' within the meaning of Article 39. Although the Congo agreement does not contain a provision similar to Article 39, it is always possible for the United Nations and the host State, if they so desire, to come to the same arrangement. No reference of this question to the International Court of Justice has so far occurred.

In the absence of any guidance from an opinion of the International Court of Justice, it is necessary to examine the possible answer of the Court to the question. This is the second and different question that arises in the construction of the agreements. What ought to be the competent body and what the proper procedure?

Neither agreement contains anything to prevent the question whether a particular act was or was not committed in the performance of official duty from being left to the courts of the host State. It has already been pointed out that the authorities in customary international law favour this

¹ For discussion of this question in relation to the agreement between the United Nations forces and Japan, see above, pp. 169-71. The answers to questions discussed here are also relevant to the immunity of 'officers' considered above, p. 187, and to the immunity of 'locally recruited personnel of the force', who enjoy the same functional immunity. See agreements with Egypt and Cyprus (Article 24); see also agreement with the Congo (Article 28).

² Italics added.

solution, which is desirable in principle.¹ In this connection Article 40 of the agreements with Egypt and Cyprus must be examined.² Article 39 having referred to differences between the United Nations and the host State involving a question of 'principle' concerning the General Convention, Article 40 provides for submission to arbitration of '*all other disputes*'³ between the United Nations and the host State concerning the interpretation and application of these agreements, which are not settled by negotiation or other agreed mode of settlement. The composition, quorum, voting and finality of the arbitration decision are all dealt with in Article 40.

This Article, although it makes provision for arbitration, hangs somewhat abstractedly, and there is no reference to the appropriate steps through which a dispute as to whether a particular act was in the performance of duty or not should proceed.⁴ The suggestion that the question should be left to the courts of the host State does not seem in any way incompatible with Article 40. The arbitral procedure could still be used if the parties are not satisfied with the adjudication of the courts of the host State.

The question whether a particular act was committed in the performance of duty is a type of issue which frequently arises in private law suits in most legal systems, and therefore is of a kind which the ordinary law courts of any country could in most cases satisfactorily solve. Given an impartial legal tribunal, the controversy ought to end there, thus avoiding the need to have recourse to the much more cumbersome process of arbitration and preserving the speed and unity so desirable in criminal cases. Moreover, if the parties are, even after a legal adjudication, not satisfied, arbitration may be used as a kind of appellate procedure. If, as in the case of the Congo, the local courts (if any) could not be expected to be impartial, then arbitration under Section 40 may well be the answer.

CONCLUSIONS

In Part I of this paper it was suggested that the structure of Article VII of the N.A.T.O. Status of Forces Agreement was not a radically new one, but a coherent statement of the principles and practices which had already emerged in customary international law.

As to international forces, it was seen that in the early cases the question of privileges and immunities was not given much consideration. In certain instances, as, for example, the circumstances in which the League

¹ See above, Part I, pp. 142-3, and Part II, pp. 169-71.

² The Congo agreement also contains an arbitration clause couched in almost identical terms: see Article 46.

³ Italics added.

⁴ The reference to 'settlement by negotiation' in Article 40 is not significant as it is available at any stage of a dispute.

forces were present for the Saar plebiscite or United Nations Security Forces went into West New Guinea, the problem did not arise in any acute form since the host State itself was placed under the administration of the international body under whom the forces served, so that a conflict of jurisdiction did not arise.

With the United Nations far greater attention has been paid to the question of their privileges and immunities.¹ The manner in which the problems of criminal jurisdiction over United Nations forces have been tackled provides two separate solutions. On the one hand the forces in Japan of the Unified Command taking part in the Korean action were subjected to the rules which we have argued to be the customary international law on this subject, and which were reflected in the N.A.T.O. Status of Forces Agreement; on the other hand U.N.E.F., O.N.U.C. and U.N.F.I.C.Y.P. experiences provide examples of absolute immunity from the jurisdiction of the host State. Absolute immunity has also recently formed the basis of the privileges and immunities conferred on the forces of the Arab League stationed in Kuwait.² It will be clear from a perusal of the agreement between the Secretary-General of the Arab League and His Highness the Ruler of Kuwait that it is an almost exact copy of the U.N.E.F. Agreement. This is the first and only example of forces not international in the modern sense following the precedent of the United Nations. It is the converse of the normal tendency of international forces to adopt the patterns established by national visiting forces.

As to possible reasons for this divergence, there are many distinctions between the Korean operation and the operations of U.N.E.F., O.N.U.C. and U.N.F.I.C.Y.P., yet none of these distinctions provides sufficiently persuasive reasons for the difference in approach to the question of criminal jurisdiction.

It has been seen that the command structure in the Korean operation was quite different from that of U.N.E.F., O.N.U.C. or U.N.F.I.C.Y.P. Not only was the Commander of the force not appointed by the United Nations, but it was the United States of America that was made responsible for the military activities of the operation, subject only to the broad lines of policy indicated by the United Nations. It is, however, arguable that this need have nothing to do with the allocation of jurisdiction between the force and the host State. Nor can it be argued that complete immunity is essential for the purpose of attracting contributions to a United Nations force. Members of the United Nations contributed to the Korean operation

¹ See, e.g., C. Wilfred Jenks, *International Immunities* (1961), Part 3, pp. 102-10.

² See *note verbale* dated 13 September 1961 from the Secretariat General of the League of Arab States addressed to the Secretariat of the United Nations and exchange of letters dated 12 August 1961, *S.C.O.R.*, Supplement for October, November and December 1961, p. 162, S/5007.

without such immunities being granted. It may be contended that, in view of constitutional problems that may arise within member States, an assurance of absolute immunity might facilitate contributions in an emergency. On the other hand, member States sending their forces abroad under the United Nations flag have no real reason to expect rights over and above those to which they would have been entitled under customary international law.

It is also possible to suggest that in considering the question of privileges and immunities a distinction should be drawn between the host State which has invited or requested the aid of the United Nations forces and host States where United Nations forces might be present incidentally, but not in order to be of any benefit to that particular State. On this argument a higher immunity may be demanded from States at whose request and for whose special benefit forces are present. This argument might be used to explain the difference in the immunity granted to forces of the Unified Command in Japan and those granted to the U.N.E.F., O.N.U.C., and U.N.F.I.C.Y.P. Yet this distinction will not explain the fact that the forces of the Unified Command present in the Republic of Korea itself could not ask for any immunities higher than those accorded to friendly forces under customary international law and these, as we have seen, do not amount to absolute immunity.

It is important to note, however, that United Nations forces have been present in the Congo and in Cyprus in circumstances quite different from those under which foreign and friendly forces are normally present in a host State. In normal cases they are present for mutual defence and training purposes, in peace-time and under stable conditions, whereas in the Congo and in Cyprus a serious breakdown in law and order had occurred.

The problem was not the same in Egypt, and it is questionable whether complete immunity was desirable or necessary in that case. It is true that the Suez operation was effected in circumstances of extreme urgency and that the United Nations was there acting without any real precedent. But it is still doubtful whether such complete immunity is justified in cases where the judicial integrity of the host State is unquestioned. The doubt that arises would become particularly pertinent should the United Nations be called upon in the future to station its forces in host States for any considerable length of time. The need for a more or less permanent United Nations force, with permanent bases, may well arise, for example, if and when disarmament agreements are concluded.

In these circumstances, where a crisis situation does not prevail in the host State, various delicate factors will have to be carefully weighed in deciding the most appropriate model for the regulation of the question of criminal jurisdiction. Due regard must be had to the fact that, while the ideal

of absolute impartiality and neutrality must always be one of the basic assumptions of United Nations action, it may become necessary to send into a host State troops which have no particular nexus, relationship or friendship with that State. On the other hand, the presence of such troops in an unfamiliar host State is bound to give rise, from time to time, to offences of a nature where public emotion is likely to be inflamed. All these factors may make the host State reluctant to grant complete immunity from its jurisdiction. To insist on such immunity might be introducing an irritant into a sensitive relationship, and it would certainly be tragic if some minor jurisdictional issue, inflated by the public indignation that can so easily arise over some incidental crime, were allowed to impair the good relations and respect that must exist between the host State and the United Nations. All these considerations indicate that it is desirable that the United Nations accept, whenever the internal conditions of the host State permit, the more delicately balanced compromise which international practice has evolved from experience and which is reflected in Article XVI of the Agreement on the Status of United Nations Forces in Japan. The more complete acceptance of this model by the United Nations will help further to crystallize the body of rules developing in this branch of international law.

ENACTMENT OF LAW BY INTERNATIONAL ORGANIZATIONS*

By KRZYSZTOF SKUBISZEWSKI, DR.IUR., LL.M.

Associate Professor of International Law in the University of Poznań

INTRODUCTION

THE present paper examines what is believed to be a fourth category of rules of international law, which is distinct from 'international custom', treaty rules, and 'general principles of law recognized by civilized nations'. This fourth category appeared with the development of international organizations and is law made by them. As international organizations use diverse techniques and procedures in their regulative enactments, it is proposed to discuss the different types of legislation and quasi-legislation by international organs. On the other hand, it is not proposed to discuss activities of international organizations by which, in co-operation with States or other inter-governmental bodies, they contribute to the growth and change of customary or treaty law.

1. THE NOTION OF INTERNATIONAL LEGISLATION

Writers who discuss the making of international law by international organizations, in particular the question whether their regulative acts constitute a distinct source of the law of nations, tend to examine the problem under the heading of 'international legislation'. However, on close examination, there appears to be some confusion surrounding the term which is used in several and often conflicting senses.¹

Logically, the notion of international legislation should convey a process of law-making that takes place with respect to, and among, members of the international community and which in its basic features is similar to legislation in the internal sphere of the State. In the State, legislation is the process of giving or enacting laws.² The word legislation has 'a well-defined meaning' and includes 'only the enactment, repeal, and amend-

* © K. Skubiszewski, 1967. The writer's monograph *Uchwały Prawotwórcze Organizacji Międzynarodowych. Przegląd Zagadnień i Analiza Wstępna* was published in 1965 by the Poznań Society of Arts and Science.

¹ Knudson, *Methods of International Legislation with Special Reference to the League of Nations* (Geneva, 1928), pp. 13-17 and 24-31 discusses the meaning of the term. Tammes, 'Decisions of International Organs as a Source of International Law', *Recueil des cours*, 94 (1958-II), at pp. 270-3 and Schultz, *Entwicklungsformen internationaler Gesetzgebung* (Göttingen, 1960), pp. 5-10 refer to the divergent meanings in which the term is used.

² Wharton's definition cited in *State v. Hyde*, 22 N.E. 644, 646, 121 Ind. 20.

ment of laws'.¹ Legislation consists of formulating rules for the future.² "Legislation" as distinguished from a judicial inquiry looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power [. . .].³ Legislation is a function performed by a properly authorized organ or body, whose authorization derives from the constitutional law or laws of the country; and enactments made in the exercise of that function are binding on their addressees irrespective of their consent.

The above elementary definition of legislation and the distinctions found in the legislative process in the domestic sphere have been taken into account by some writers on international law. 'We shall define international legislation'—writes one of them—'as the enactment of international law by formal action of less-than-unanimous consent.'⁴ Another writer contends that 'if the norm is adopted by a majority-vote decision of an organ, composed of representatives of all parties to the treaty establishing the organ, and especially by the majority-vote decision composed only of representatives of some of the parties to this treaty, the creation of the norm assumes the character of legislation'.⁵ But more often than not writers ascribe to international legislation a meaning and content that deviate from the standards of municipal law and practice. For example, in one study alone international legislation covers such divergent phenomena as conclusion of treaties, amendment of the latter with the effect that a State which disagrees with the amendment adopted by the majority ceases to be a contracting party, adoption of binding decisions by international organs (including resolutions concerning specific States and situations), and enactment of legal rules for States by such organs.⁶

The title and contents of Manley O. Hudson's collection suggest that international legislation is the making of multilateral treaties on matters of general interest.⁷ However, the learned editor's own explanation appears to convey a wider meaning: 'The term international legislation would seem to describe quite usefully both the process and the product of the conscious

¹ *Ex parte Wolters*, 144 S.W. 531, 538, 64 Tex. Cr. R. 238.

² *Oklahoma City, Okl. v. Dolese* (C.C.A. Okl.) 48 F. (2nd) 734, 738.

³ *Oklahoma Gas and Electric Co. v. Wilson and Co. of Oklahoma* (C.C.A.) 54 F. (2nd) 596, 598.

⁴ Potter, *An Introduction to the Study of International Organization* (5th ed., New York, 1948), p. 209.

⁵ Kelsen, *Principles of International Law* (New York, 1952), p. 366.

⁶ The reference is to Schultz's work cited above, p. 198, n. 1. However, on p. 8 Schultz gives a definition which is in line with the municipal notion of legislation: 'Unter internationaler Gesetzgebung soll eine Staaten bindende Normsetzung völkerrechtlicher Provenienz durch ein besonderes und ständiges Gesetzgebungsorgan auf der Grundlage des Mehrheitsentscheids verstanden werden.'

⁷ *International Legislation. A Collection of the Texts of Multipartite International Instruments of General Interest* (Washington, 1931-50), vols. 1-9, 1919-45. Parry, *The Sources and Evidences of International Law* (Manchester, 1965), p. 110, points out that this was the meaning of the term at the moment of the founding of the League of Nations.

effort to make additions to, or changes in, the law of nations.'¹ Hudson's definition would thus cover also regulative acts of international organizations. Even so, he must have been aware of the scarcity of law emanating from the latter source. He stated that 'analogy to national legislation is not perfect and it cannot be pressed too far: but it may be resorted to for borrowing the general term legislation, and the term is a convenient one for designating the introduction of law governing the relations of States'.² Here the phrase 'introduction of law' is perhaps too general and, therefore, may prove misleading. For once an international custom is formed, a rule corresponding to the custom is also 'introduced' into the law of nations. While the intention to include the making of customary law among the processes of international legislation cannot be ascribed to Hudson (he spoke of the 'conscious effort', and the element of consciousness is absent from the creation of custom), there are authors who mention explicitly customary law as the product of international legislation.³ Barring, however, this extravagant interpretation of the term, we may repeat after Judge Philip C. Jessup that it 'is now commonly used to describe many multi-partite treaties which lay down rules by which States agree to be bound'.⁴ The restriction of the term to treaties has the odd effect of implicitly excluding its application to situations where an international organ enacts law by virtue of majority decisions. On this basis, an activity displaying all the features of legislation as understood in the national sphere would not be called international legislation because it does not result in producing a multilateral treaty.⁵

The perversion of the notion of legislation which has occurred in international practice and writings may partly be explained by the fact that the international community remains deprived of a legislature similar to that of a State. It is a truism to say that in the international community the treaty fulfils the function which in the State pertains to a statute. There is one common flaw in definitions of international legislation which go beyond the meaning and analogy suggested by national experience: they over-emphasize the product of the law-creating process instead of concentrating on the process itself and its features. It is the latter which cause treaties to be so different from statutory enactments. The final result of the law-

¹ Manley O. Hudson, *op. cit.* in the preceding note, vol. 1, p. xiii. At pp. xiii-xiv he cites some earlier doctrinal writings in which the connotation of the term has been discussed.

² *Ibid.*, p. xv; McNair, 'International Legislation,' *Iowa Law Review*, 19 (1934).

³ They are quoted by Schultz, *op. cit.*, pp. 5-10.

⁴ Jessup, 'Parliamentary Diplomacy. An Examination of the Legal Quality of the Rules of Procedure of the United Nations', *Recueil des cours*, 89 (1956-I), p. 203.

⁵ Hence the correctness of the more cautious formulation by Brierly, 'The Legislative Function in International Relations', *The Basis of Obligation in International Law and Other Papers* (Oxford, 1959), p. 214: 'The nearest international counterpart to a legislative body is a conference of the representatives of states, the nearest counterpart to an act of legislation is a treaty or convention.'

making process—i.e., the legal rule—is the same no matter from what specific source the law in question originated: be it custom (municipal or international), statute or sources deriving from statute, international treaty, or judicial precedent. It would have been better if the term 'legislation' in its perverted meaning had not been adopted into the vocabulary of international law and relations. The present paper will refer to legislation only when there is enactment of general and binding rules of conduct by international organs.

2. LAW-MAKING RESOLUTIONS OF INTERNATIONAL ORGANIZATIONS

Legislation by international organs is effected through their law-making (regulative) resolutions. Today the number of resolutions adopted by international organizations is legion. But only a small fraction of them bear the characteristics of law-making. A law-making resolution is one which is binding on its addressees by virtue of the decision of the organization and which lays down general and abstractly formulated rules of conduct. The drafting, adoption, entry into force, validity, application, effects, modification, and termination of the law-making resolutions of international organizations are not governed by the law of treaties. They are regulated by the law, in particular the constituent instrument, of the organization which adopted the resolution in question. The law-making resolution of an organization is not a contractual instrument in which the members of the organization appear as parties. It is an act of the organization which is different from a treaty concluded either between the organization and the members or among the latter *inter se*.

Whether the resolution is binding depends on the provisions of the constitution of the organization. These provisions may, it is true, be supplemented by the practice of the organization. But only practice that has been accepted as law by all the members of the organization can provide a basis for the enactment of mandatory resolutions. Binding resolutions are voted under different names:¹ regulations, rules, decisions, annexes, directives, etc. These and other names cannot be regarded as indicating the obligatory force of the resolution. In this sphere the terminology is neither uniform nor consistent, and the same term may in different organizations be used to describe in one case a binding act and in another a mere *vœu* or expression of opinion. If the names of the resolutions were conclusive, 'recommendations' would be excluded from the purview of the present discussion; for a recommendation is non-binding by definition. Yet in some organizations the name and form of 'recommendation' have been

¹ Cf. Mosler, 'Internationale Organisation und Staatsverfassung,' *Rechtsfragen der Internationalen Organisation. Festschrift für Hans Wehberg* (Frankfurt, 1956), p. 284.

adopted to cover a resolution which is binding from its inception, i.e. by virtue of the constituent instrument, for instance, the part relating to objectives in the recommendations of the High Authority of the European Coal and Steel Community;¹ or the recommendations of the North-East Atlantic Fisheries Commission.² There are also instances where a recommendation has been later accepted and treated as binding by members;³ this, however, must be distinguished from the first case, for here a non-binding resolution becomes transformed into a set of legal rules through agreement of States and does not acquire its binding effect by virtue of the decision of the organization.

That a law-making resolution lays down general and abstract rules of conduct is an obvious requirement which it would not be necessary to refer to were it not for the fact that according to some writers whenever a resolution possesses binding force it becomes an instrument of international law-making. Thus decisions of the Security Council under Chapter VII of the Charter of the United Nations or decisions of the Committee of Ministers of the Council of Europe under Article 32 of the Convention for the Protection of Human Rights and Fundamental Freedoms⁴ have been adduced as examples of law-making.⁵ But acts of this kind do not lay down rules of conduct to be applied in an unlimited number of situations covered by the resolution. They concern exclusively specific addressees (in contrast with the unlimited number of those falling under a legislative enactment) and situations occurring at a specific place and time (in contrast with the abstractly defined circumstances in the legislative act). Hence the binding resolutions of international organizations must be divided, for our purposes, into those which create law and those which are executive in character and pertain to international administration *sensu stricto* rather than to legislation. Administrative acts become more and more frequent in the activities of international organizations, in particular in some of the United Nations Specialized Agencies (e.g. the decisions

¹ Article 14, § 3, of the Treaty constituting the Community, 18 April 1951, *United Nations Treaty Series*, vol. 261, p. 141. (Cited throughout this article as *U.N. Treaty Series*.)

² They are binding under the conditions formulated in the North-East Atlantic Fisheries Convention, 24 January 1959, Miscellaneous No. 3 (1959), Cmnd. 659.

³ E.g. some recommendations of the former Organisation for European Economic Cooperation, Freymond, 'Les "Décisions" de l'Organisation Européenne de Coopération Économique (O.E.C.E.). Contribution à l'étude des procédures à l'effet de conclure des traités', *Annuaire Suisse de droit international*, 11 (1954), p. 68, n. 5. The possibility of the transformation of recommendations into law has been provided for by Article IV, § 1, of the Charter of the Council for Mutual Economic Assistance, *U.N. Treaty Series*, vol. 368, p. 253.

⁴ Signed on 4 November 1950 in Rome, *ibid.*, vol. 213, p. 221.

⁵ By Dahm, *Völkerrecht* (Stuttgart, 1958), vol. 1, p. 27. Cf. also Sibert, *Traité de droit international public* (Paris, 1951); Wohlfahrt, 'Europäisches Recht. Von der Befugnis der Organe der Europäischen Wirtschaftsgemeinschaft zur Rechtsetzung', *Jahrbuch für Internationales Recht*, 9 (1959), p. 26; and Jaenicke, 'Völkerrechtsquellen', *Strupp-Schlochauer Wörterbuch* (Berlin, 1962) vol. 3, p. 772.

under Article 4 of the Agreement setting up the International Monetary Fund¹ on certain problems involving par values) and in the commodity bodies such as the International Sugar Council² and the International Wheat Council³ (decisions on quotas). Another example of executive or administrative acts is provided by individual decisions of the High Authority of the European Coal and Steel Community.

In this connection it may be recalled that certain judgments of the Court of Justice of the European Coal and Steel Community contain statements on the nature of general and individual (particularized) decisions. While the judgments are precedents for the Community alone, they are relevant in ascertaining the characteristics of any law-making resolutions, as the dicta of the Court might equally be applied to other organizations. In *Fédération Charbonnière de Belgique v. The High Authority (Interim Judgment)*⁴ the Court had, *inter alia*, to resolve the question whether a certain decision made by the High Authority of the Community was general or individual. In the Court's view 'general decisions [of the Community] are quasi-legislative acts originating from a public authority and have a normative effect *'erga omnes'*'.⁵ 'The nature of a decision does not depend upon its form, but upon its content.'⁶ It may be added that two years later, in *Wirtschaftsvereinigung Eisen-und Stahlindustrie and Others v. The High Authority* the Court had the opportunity to repeat its opinion. According to the Court, a decision is general because 'it establishes a normative principle; it imposes in a general fashion the conditions for its application and it specifies the legal consequences which it will bring about'.⁷ In the *Fédération Charbonnière* case the decision of the High Authority which the Court had to consider had been taken in the framework of the compensation system established by paragraph 26 of the Convention on Transitional Measures, and the plaintiffs submitted that it was an individual decision. The Court did not agree with this contention, holding that the system of compensation 'is applicable, according to the particular circumstances, however detailed or varied they may be, to all the enterprises and to all the transactions falling within its scope'. 'The decision', it said, 'applies to enterprises by reason only of the fact that they are producers of coal, without any other requirement.' 'The fact that [. . .] it consists of a detailed and concrete set of rules applicable to different situations, is not

¹ *U.N. Treaty Series*, vol. 2, p. 39.

² *Ibid.*, vol. 385, p. 137.

³ *Ibid.*, vol. 349, p. 167.

⁴ Case No. 8/55, Judgment of 16 July 1956, *Recueil de la jurisprudence de la Cour de Justice de la C.E.C.A.* 2 (1955-6), p. 201; English translation in *I.L.R.* 25, p. 417. (The *Recueil* just cited and its successor—*Recueil de la jurisprudence de la Cour de Justice des Communautés Européennes*—are cited throughout this article as *Recueil de la jurisprudence de C.J.C.E.*)

⁵ *I.L.R.* 25, p. 421.

⁶ *Ibid.*, p. 420.

⁷ Case No. 13/57, Judgment of 21 June 1958, *Recueil de la jurisprudence de C.J.C.E.* 4 (1958), p. 263; English translation in *I.L.R.* 25, p. 484, at pp. 487-8.

contrary to the general character of the decision.' And it added: 'Concrete, detailed and varied consequences of a general decision do not detract from that general character.'¹

It may be that an executive act of an international body will lead to the enactment of law in order to effect compliance with such act in the *internal* sphere of the State on which the act is binding. Thus a member State which is ordered by the Commission of the European Economic Community² to abolish or modify a system of aid that favours certain enterprises or certain products may be obliged to repeal or revise its national laws on the subject and thus undertake steps in the field of national legislation. However, this type of consequence of the international act in the sphere of municipal law does not bestow on the act the character of law-making if the act itself does not contain abstract rules of conduct.³

In the sections that follow, the regulative acts of international organizations are divided into groups according to the procedure of their adoption: unanimity, majority with the safeguard of contracting-out, and majority that absolutely binds the outvoted minority. The latter category of acts is subdivided into law-making related to the so-called internal affairs of the organization, and law-making that bears directly on the rights and duties of States.

3. LAW-MAKING BY UNANIMITY

Law-making resolutions adopted by a unanimous vote are the oldest vehicle of legislation by international organizations. They come very close to treaties, and the question whether and how far they differ from inter-State agreements concluded in a special form will be discussed later.⁴

European and International Commissions of the Danube

The origins of law-making by international bodies through unanimous decisions are associated with the internationalization of certain European rivers and the setting up of intergovernmental commissions the function of which was to deal with different aspects of the use of the waterways in question. The European Commission of the Danube, established under the Treaty of Paris of 1856, came to exercise powers of legislation and enacted,

¹ I.L.R., 25, p. 419. For further judgments and a discussion of the notion of the general act in the European Coal and Steel Community, see Bebr, *Judicial Control of the European Communities* (London, 1962), pp. 41-49.

² Treaty of 25 March 1957, *U.N. Treaty Series*, vol. 298, p. 11. The example is based on Article 93, § 2.

³ For a correct distinction between particularized decisions and abstractly formulated enactments see Sørensen, 'Principes de droit international public. Cours général', *Recueil des cours*, 101 (1960-III), pp. 107-8. Cf. also Levin, *Osnovnyie Problemy Sovremennogo Mezhdunarodnogo Prava* (Moscow, 1958), p. 103, and Tunkin, *Voprosy Teorii Mezhdunarodnogo Prava* (Moscow, 1962), pp. 129-30.

⁴ Below, p. 220.

by agreement of all its members, rules of navigation and of police for the portion of the river subject to its competence (maritime Danube); the entry into force of the Sinaia arrangement of 18 August 1938 put an end to the long exercise of the law-making powers by the Commission and, practically, to the very existence of the organ itself.¹ The further International Commission of the Danube also exercised regulative powers, in its final phase under Article 24 of the Convention Instituting the Definitive Statute of the Danube, signed at Paris on 23 July 1921; the activities of the Commission were *de facto* terminated through the agreement of 1940 sponsored by Germany and concluded by all the riparian States.²

Central Commission for the Navigation of the Rhine

Another river commission equipped with legislative powers, the Central Commission for the Navigation of the Rhine, has an even older history than the European Commission of the Danube, and as it remains in existence it is the earliest of the international bodies which today exercise powers of law-making by virtue of unanimous resolutions.

The Congress of Vienna of 1815 entrusted the Central Commission for the Navigation of the Rhine with the task of making regulations for the navigation of that river (Article XXXII of Annex 16B to the Final Act of the Congress). This task was first performed not through the enactment of law by the Commission but through the conclusion of a contractual instrument by States represented in the Commission. The instrument was the Convention of Mayence of 1831, later replaced by the Revised Convention for the Navigation of the Rhine signed at Mannheim on 17 October 1868,³ which remains in force. Once constituted under the implementing Convention, the Commission started enacting regulations which governed in detail the different aspects of Rhine navigation. Article XVII of Annex 16B provided that decisions of the Commission should be taken by a majority of votes. However, they were to be binding only for those States whose Commissioners voted for the resolution. According to Article 46 of the Mannheim Convention

¹ The legislative activities of the Commission are mentioned by Merle, 'Le Pouvoir réglementaire des institutions internationales', *Annuaire français de droit international*, 4 (1958), p. 344, and Tammes, loc. cit., p. 284. See Article 3 of the Sinaia arrangement, *League of Nations Treaty Series*, vol. 196, p. 113 (Cited throughout this article as *L.N. Treaty Series*). See also Baxter, *The Law of International Waterways, with particular regard to Interoceanic Canals* (Cambridge, Mass., 1964), p. 129.

² For the text of the Convention, see *L.N. Treaty Series*, vol. 26, p. 173. See Baxter, *ibid.*, pp. 126-7. The problem of the regulative powers of the present Danube Commission is discussed below, p. 253.

³ *Martens, N.R.G.* 20, p. 355. The predecessor of the Rhine Commission, the *Administration Générale de l'Octroi de Navigation du Rhin*, was empowered, under the Paris Convention of 15 August 1804 (Article CXXX), to make provisional rules and regulations which had to be referred to the Governments for approval, *Martens*, 8, p. 261. See Baxter, *op. cit.*, p. 98.

'... the resolutions of the Central Commission shall be taken by an absolute plurality of votes, voting being perfectly equal. Such resolutions, however, shall be obligatory only when they have been approved by the governments.'

Thus the Commission must be counted among the bodies which make law by unanimity.¹ Cases occurred where one or more members of the Commission voted against a resolution which nevertheless was validly accepted because there was a majority of votes behind it. It is worth while to recall that during the inter-war years the members of the Central Commission did not exercise their privilege of refusing to give effect to a resolution against which they had voted.² At the present moment there are in force nine acts made by the Commission. Seven bear the name of regulations (*règlements*), one is described as provisions (*préscriptions*), and one received the form of a convention. They regulate the following subjects: river police, roadsteads, visit of vessels and rafts, customs, licensing of boatmen, and transport of certain inflammable materials, of corrosive and poisonous substances, and of fuels.³

The European Coal and Steel Community

This organization, set up under the Treaty of Paris of 18 April 1951,⁴ has wide law-making powers, but they are mainly exercised by the High Authority (or the Commission under the Treaty of 8 April 1965) which adopts its decisions and recommendations by majority. The Treaty requires unanimity with respect to some acts of the Special Council (which becomes the Council under the Treaty of 8 April 1965). However, the Council rarely fulfils legislative functions; for example, the provisions on customs duties under Article 72 are made by a unanimous decision.

The European Economic Community

While the principle of unanimity is of little importance to the law-making activities of the Coal and Steel Community, it plays a significant role in

¹ The principle stated in the Mannheim Convention has been reiterated in the Additional Protocol concerning the Adhesion of the Netherlands to the Modifications Introduced by the Treaty of Versailles in the Convention of Mannheim of 1868, signed in Paris on 29 March 1923, *L.N. Treaty Series*, vol. 20, p. 117. Cf. Baxter, *op. cit.*, pp. 130-1. The principle of unanimity underwent no modification with respect to *binding* resolutions of the Commission under the new text of Article 46. For this text see Strasbourg Convention of 20 November 1963 relating to the revision of the Mannheim Convention, *European Yearbook*, 11 (1963), p. 175. On the other hand, the new text provides for the adoption of *recommendations* by majority. At the moment of writing the new text has not yet entered into force. See Walther, 'La Révision de la Convention de Mannheim pour la navigation du Rhin', *Annuaire français de droit international*, 11 (1965), p. 810.

² Baxter, *op. cit.*, p. 131, citing Van Eysinga, *La Commission centrale pour la Navigation du Rhin* (1935), p. 126.

³ See *Les Actes du Rhin* (Strasbourg, 1957), p. 55, and *European Yearbook*, 4 (1956), p. 245.

⁴ *U.N. Treaty Series*, vol. 261, p. 141. On 8 April 1965 there was signed the *Traité instituant un Conseil unique et une Commission unique des Communautés Européennes*. This treaty, which at the moment (the present article was submitted May 1966) has not yet entered into force, is intended to revise a number of provisions in the treaties establishing the Communities.

the European Economic Community. The constitutive Treaty signed at Rome on 25 March 1957¹ specifies that 'except where otherwise provided for in this Treaty, the conclusions of the Council shall be reached by a majority vote of its members' (Article 148, paragraph 1). The exceptions are numerous, and concern Community matters of the highest importance, including the basic policy decisions ('statements' under Article 8) as to whether the objectives of each stage of the transitional period during which the Common Market is being established have been achieved.² The Council makes law by unanimity on the following subjects: fixing of duties under the common customs tariff in circumstances and within time-limits specified in Article 20 (the requirement of unanimity was binding only up to the end of the second stage) and modification or suspension of such duties for the duration of the transitional period (Article 28);³ common agricultural policy (until the end of the second stage (Article 43 (2));⁴ social security measures necessary to effect the free movement of workers (Article 51 in conjunction with Articles 117-22);⁵ extension of the benefit of the provisions on services (Articles 59-66) to cover services supplied by nationals of any third country who are established within the Community (Article 59); progressive co-ordination of the exchange policies of member States in respect of the movement of capital between those States and third countries (Article 70 (1), directives only); matters concerning transport by rail, road and inland waterway covered by Article 75 (unanimity was required only until the end of the second stage);⁶ sea and air transport (Article 84 (2)); harmonization of the law of the various member States on turnover taxes, excise duties and other forms of indirect taxation (Article 99); here the Council has not been expressly authorized to make regulations, but the power to do so does not seem to be excluded by the general language of Article 99); principles governing the unification of the municipal laws of the member States which have direct incidence on the establishment and functioning of the Common Market (Article 100, directives); policies relating to economic trends (Article 103 (2)), though it may be doubted, in view of the provision of paragraph 3, whether such policies can be laid down in the form of legislative enactments as

¹ English translation, *ibid.*, vol. 298, p. 11. See also the preceding footnote. For different categories of the Council's enactments see below pp. 232 et seq.

² See the decision of 14 January 1962, *Journal officiel des Communautés Européennes* (1962), p. 164 (cited throughout this article as *Journal officiel des C.E.*).

³ Cf. decisions of 13 February and 20 July 1960, *ibid.* (1960), pp. 1537 and 1873.

⁴ Regulations Nos. 19-26 adopted on 4 April 1962, *ibid.* (1962), pp. 933 et seq., and decisions of the same date, *ibid.*, pp. 955 et seq.

⁵ Cf. 'Verordnung Nr. 3 über die soziale Sicherheit der Wanderarbeitnehmer,' *Amtsblatt* (1958), p. 561; 'Verordnung Nr. 4', *ibid.*, p. 597. The references to the *Amtsblatt* may be replaced by those to the *Journal Officiel des C.E.* as the pagination of both is the same.

⁶ See Bin Cheng, 'Transport Law of the European Communities. An Illustration of Supra-national Dynamism', *Current Legal Problems*, 16 (1963), p. 197.

distinguished from policy statements; harmonization of measures undertaken by member States to aid exports to third countries (Article 112 (1), directives, unanimity being required only until the end of the second stage); equal remuneration for equal work without discrimination based on sex (Article 119); and particulars and procedure concerning the association of overseas countries and territories with the Community after 1 January 1963 (Article 136).¹ The Council also possesses a general law-making competence under Article 235:

'If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions.'

During the first years of its existence, particularly during the first stage (1958-61) of the transition period, the Council had legislative powers in matters additional to those enumerated above, but at the present moment, according to the Treaty, such matters are no longer regulated by unanimous resolutions.²

Atomic Energy Community (Euratom)

The third European Community, that of Atomic Energy, is the least important of the three in regard to legislation. By virtue of the Rome Treaty of 25 March 1957³ its powers of law-making are narrow and secondary. The Council adopts unanimous enactments on prices of ores, source materials and special fissionable materials (Article 69), and on an earlier application of the duties of a common customs tariff to certain products (Article 95). It may be observed that these two subjects seem suited for regulation in an act of administrative rather than legislative character. By analogy to the Economic Community, the Euratom Treaty bestowed on the Council a general competence to 'enact the appropriate provisions' where 'any action by the Community appears necessary to achieve one of the aims of the Community' and the 'Treaty has not provided for the requisite powers' (Article 203).

Benelux

In the Economic Union between Belgium, Luxembourg and the Netherlands set up under the Treaty of 3 February 1958⁴ the Committee of Ministers, by virtue of Article 19 (a),

¹ Prior to that date the subject-matter was regulated by the Implementing Convention annexed to the Treaty.

² Cf. Article 44, § 3, fourth sub-paragraph; Article 54, § 2; Article 57, § 1; Article 63, § 1; Article 87; and Article 101, second sub-paragraph.

³ English translation in *U.N. Treaty Series*, vol. 298, p. 169. And see above, p. 206, n. 4.

⁴ *U.N. Treaty Series*, vol. 381, p. 165.

'may take decisions setting forth the manner in which the provisions of this Treaty are to be put into effect in accordance with the conditions laid down in the Treaty. These decisions shall commit the High Contracting Parties.'

The principle of unanimity governing the adoption of the decisions by the Committee is subject to the exception that the abstention of one member 'shall not prevent a decision being taken' (Article 18).

The European Free Trade Association (E.F.T.A.)

Under its constituent Convention signed at Stockholm on 4 January 1960¹ E.F.T.A. can equally exercise law-making powers in certain fields. These powers belong to the Council of the Association. The Convention provides for certain exceptions from unanimity, but these do not seem to cover situations where the Council makes law. 'Decisions or recommendations shall be regarded as unanimous unless any Member State casts a negative vote' (Article 32, paragraph 5), and such decisions are binding on all members (same Article, paragraph 4). Thus in the Association mere abstention neither invalidates the decision nor makes it inapplicable with regard to the non-participating member. It follows from the Convention that the Council has law-making powers on the earlier reduction or elimination of import duties (Article 3, paragraph 5); quantitative import restrictions (Article 10, paragraph 10); effects of restrictive business practices or dominant enterprises on trade (Article 15, paragraph 3); restrictions on the establishment and operation of economic enterprises (Article 16, paragraph 4); and gradual abolition of subsidized exports detrimental to other member States (Article 24, paragraph 2).

Economic Association between El Salvador, Honduras and Guatemala

It appears that there is a possibility of some law-making activity in the Economic Association provided for in a Treaty signed at Guatemala City on 6 February 1960;² for the Governing Board of the Association may decide what regulations are necessary for the execution of the Treaty (Article XXII, second paragraph). On the other hand, any resolutions of the Board designed to be law-making in character must relate to subjects for which express provision has been made in the Treaty.³

Organization for Economic Co-operation and Development (O.E.C.D.)

Finally, the O.E.C.D. has been equipped with competence to make law by unanimous decision. Under its Convention signed at Paris on 14 December 1960,⁴ all acts of the Organization derive from its Council

¹ Ibid., vol. 370, p. 3.

² Ibid., vol. 383, p. 3.

³ This view is based on what follows *a contrario* from Article XXVI.

⁴ *European Yearbook*, 8 (1960), p. 259.

(Article 7), which takes decisions that are binding, as a rule, on all the members (Article 5 (a)). An abstention does not invalidate a decision, but merely renders it inapplicable to the abstaining member. The Organization is a successor to the Organization for European Economic Co-operation¹ (Article 15). During its thirteen years of existence the latter Organization (O.E.E.C.) engaged in extensive regulatory activity and enacted several regulations which were of basic importance to the reconstruction and growth of the economic life of Western Europe. Neither the Convention which set up the O.E.E.C., nor the one under which the O.E.C.D. is now functioning, indicated the matters on which the two bodies respectively had or now have competence to enact law. Hence the area covered by the legislation of the dissolved Organization was co-extensive with the whole field of activity of the Organization as delimited by its aims. An equally broad scope for possible legislation by the new Organization follows from the terms of the Convention of 1960. The law-making decisions of the old Organization concerned such subjects as technical assistance, international fairs, and foreign trade. Several of them continue to be effective in the framework of the present Organization, including a number of provisions contained in the Code of Liberalization adopted by the Council of the O.E.E.C. on 20 July 1951 and thereafter amended as need arose.² The Code deserves special mention, for it figures prominently among the enactments of the Organization. It deals in detail with the liberalization of trade and invisible transactions, lays down specific procedures for bringing about such liberalization, sets up the Steering Board of Trade as well as technical committees and defines their terms of reference. It has, in view both of the scope of its provisions and its role, been rightly described as a 'charter of intra-European trade'.³ The Code is a substitute for many provisions which, until it was adopted, could be found only in commercial treaties.⁴ In fact, were it not for the Code, the member States, in order to liberalize their trade, would be compelled to conclude either a multilateral treaty of commerce or a series of bilateral treaties.⁵

4. LAW-MAKING BY MAJORITY AND CONTRACTING-OUT

Toward the end of the Second World War there developed a new technique of law-making by international organizations. The rule of

¹ Set up under the Convention signed at Paris on 16 April 1948, *U.N. Treaty Series*, vol. 92, p. 269.

² It was the decision of 18 August 1950 which laid down the principles of the future Code: cf. Freymond, loc. cit., p. 70. For text, see *European Yearbook*, 3 (1955), p. 254. The question of the continued binding force of the O.E.E.C. decisions is discussed below, p. 264.

³ Freymond, loc. cit., p. 70.

⁴ Ibid.

⁵ Robertson, *European Institutions* (London, 1959), p. 54, observes that the decisions of the O.E.E.C. were a substitute for conventions. He regards the decision-making by the O.E.E.C. as a significant development in international legislation.

unanimity was a practical solution in regional bodies where the membership was small and the community of interests rather strong. In larger organizations, and especially in those which strove to acquire universal membership, unanimous law-making resolutions would, because of conflicting interests, either be impossible of adoption or be rendered almost meaningless in the process of satisfying any and every objector. Yet there arose a need to bestow certain legislative functions on organizations the task of which was to co-ordinate the activities of States in a selected field on a world scale. Hence States adopted a new system of law-making which became known as that of contracting-out.

The core of the system is that the organization is empowered, by virtue of its constitution, to make law through majority decisions, but members retain the rights to reject the regulations or to make reservations thereto (the right to contract out). These rights may be exercised within a specified period of time. Among the organizations and enactments falling under this head there are some where the freedom of members to dissent and thus to remain beyond the regulative effect of the resolution is actually limited by reason of the risk of the resulting disadvantages, while in one case the freedom to make reservations depends on the consent of the legislating organization. Today four organizations, three of them Specialized Agencies of the United Nations, adopt law-making resolutions in the framework of the contracting out system.

*The International Civil Aviation Organization (I.C.A.O.)*¹

The Council of the Organization, a body composed of twenty-seven member States² and elected by the Assembly, adopts international standards and recommended practices and designates them, for convenience, as annexes to the I.C.A.O. Convention (Article 54 (1)). The difference between standards and practices is basic for the purposes of the present paper. International standards embody binding rules of conduct, while recommended practices are not obligatory. The I.C.A.O. Procedures for Air Navigation Services and the Regional Supplementary Procedures are, in their legal nature, similar to the recommended practices in that they are not binding. It is true that Article 90 (a) stipulates that both the standards and recommended practices 'shall become effective' if they meet the requirements specified in that provision. However, effectiveness with regard to recommended practices is not equivalent to binding force but means only that the text in question has been definitively adopted and should—not shall—be followed by the members. Recommended practices may

¹ *U.N. Treaty Series*, vol. 15, p. 295, thereafter amended.

² Number established under the amendment to Article 50 (a) effective 17 July 1962.

become international standards if they gain a sufficient degree of acceptance and the matter is properly submitted to normative regulation.¹

The Convention empowers the Council to establish standards in all matters concerned with the safety, regularity and efficiency of air navigation. Article 37 lists *exempli gratia* eleven such matters. But the range of the Council's legislation is not confined to that list, nor is it limited by those substantive provisions of the Convention where reference is made only to recommendations.² In practice neither the members nor the Organization regard these provisions as restricting the Council's power to make law provided the Council remains within the framework of the general authorization of Article 37. So far the Council has adopted fifteen annexes to the Convention: (1) Personnel Licensing, (2) Rules of the Air, (3) Meteorology, (4) Aeronautical Charts, (5) Units of Measurement to be used in Air-Ground Communications, (6) Operation of Aircraft—International Commercial Air Transport, (7) Aircraft Nationality and Registration Marks, (8) Airworthiness of Aircraft, (9) Facilitation, (10) Aeronautical Telecommunication, (11) Air Traffic Services, (12) Search and Rescue, (13) Aircraft Accident Inquiry, (14) Aerodromes, and (15) Aeronautical Information Services.³ The Council adopts the standards by a vote of two-thirds at a meeting called for that purpose. The standards are then submitted to the member States. If a majority of them register their disapproval with the Council, the annex in question does not become effective. Otherwise, the standards enter into force within three months after their submission to member States or at the end of such longer period as the Council may prescribe (Article 90 (a)). Amendments to international standards are adopted by the Council by the same qualified majority of two-thirds.⁴

Any member State which disagrees with the enactment of the Council (including amendments) has the right to reject the annex wholly or in part;

¹ United States, Department of State, *Proceedings of the International Civil Aviation Conference* (Washington, 1948, Publication No. 2820), vol. 1, p. 708. As to the definition of the two terms, see I.C.A.O. Resolution A1-31 adopted by the first Assembly of the Organization in May 1947, I.C.A.O. Doc. 7325, C/852. See also 19th Session of the Council, I.C.A.O. Doc. 7390-7, C/861, p. 91, cited by Mankiewicz, 'L'adoption des annexes à la convention de Chicago par le Conseil de l'Organisation de l'Aviation Civile Internationale', *Beiträge zum internationalen Luftrecht. Festschrift zu Ehren von Prof. Dr. iur. Alex Meyer* (Düsseldorf, 1954), p. 88. Cf. Schenkman, *International Civil Aviation Organization* (Geneva, 1955), pp. 258-9 and Cheng, *The Law of International Air Transport* (London, 1962), pp. 68-70.

² Articles 25, 26, and 35. Cheng discusses the question whether according to a purely literal interpretation of the Convention the Organization is not deprived of the competence to establish standards in matters covered by these provisions; see *op. cit.* in the preceding footnote, p. 147.

³ The Annexes to the Convention are published officially by the Organization in a separate series. For a list of editions current on 1 July 1965, see *I.C.A.O. Bulletin*, 20 (1965), No. 7, p. 14.

⁴ According to Cheng, *op. cit.*, p. 65, n. 5, this does not necessarily follow from the letter of the Convention.

it then notifies the Organization accordingly (Articles 38 and 90). The time-limit for disapproval is three months from the moment of notification by the Organization (unless a longer period has been prescribed); the time-limit for rejecting amendments is sixty days. The Council communicates to all other members the difference which exists between one or more features of an international standard and the corresponding national practice of the dissenting member (Article 38).

Attention has been drawn to a number of provisions in the Convention which might be interpreted as restricting the freedom of members always to contract out.¹ Thus Article 12 provides that with regard to the flight and manoeuvre of aircraft over the high seas 'the rules in force shall be those established under this Convention', while the rules relating to the flight over, and manoeuvre within, the territory of a State must be 'uniform, to the greatest possible extent, with those established from time to time under this Convention'. The omission, with respect to the high seas, of the words 'to the greatest possible extent' seems to imply that the legislation of the Council on the subject does not allow of any departures from it.² While the categorical language of Article 12 supports this interpretation, it may none the less be contended that any 'establishing' of rules by the Organization under the Convention takes place according to procedures prescribed in Chapter VI, and Article 38 does not speak of any exemptions from the system of contracting-out. Another, though somewhat less clear, exception appears to have been formulated in Article 77 which gives the Council the competence to determine in what manner the provisions of the Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies. On the other hand, Articles 21, 33 and 34 do not give rise to such doubts. Nor does Article 71, under which the Council has the power to legislate on the charges for the use of airport and air navigation facilities; for this power is based on, and originates in, the request which the State concerned has addressed to the Council.

None of the annexes adopted by the Council has ever been rejected *in extenso* by the majority of the members, and the members' reservations to the international standards have been rare and have not concerned basic issues.³ It appears that the success of the legislative activity of the Organization has two explanations:

First, the actual authority of, and confidence in, the provisions adopted

¹ Cf. Cheng, *ibid.*, pp. 149-50.

² This view is taken by Cheng, *ibid.*, pp. 65 and 148. Cf. Carroz, 'International Legislation on Air Navigation over the High Seas', *Journal of Air Law and Commerce*, 26 (1959), p. 158.

³ Mankiewicz, *loc. cit.*, p. 87. Cf. reservations referred to by him and contained in I.C.A.O. Docs. A7-WP/27 TE/3, 7361-9 C/858 at p. 102, C-WP/1539, 7418-3 C/865 at p. 23, and A7-9 1417 A7 P/3. The application of the I.C.A.O. Annexes by a non-member can be effected through an agreement; cf. § 14 of the Annex to the U.K.-U.S.S.R. air services agreement of 19 December 1957, cited by Cheng, *op. cit.*, p. 68. The Soviet Union is not a member of the I.C.A.O.

by the Council are substantial.¹ The Council's enactments are being elaborated in the framework of a careful process consisting of several stages,² and with the participation of experts. Before the Council adopts an annex, it consults all the member States. Moreover, the Council itself, being composed of States of chief importance in air transport, of States which make the largest contribution to the provision of facilities to international civil air navigation, and of States otherwise assuring the representation of the major geographic areas of the world in the Council, is well qualified to perform the task.

Secondly, members who avail themselves of the right to contract out run, in the case of certain regulations, the risk of being excluded from, or limited in, their participation in international navigation. Thus, the Convention provides:

Article 39

'(a) Any aircraft or part thereof with respect to which there exists an international standard of airworthiness or performance, and which failed in any respect to satisfy that standard at the time of its certification, shall have endorsed on or attached to its airworthiness certificate a complete enumeration of the details in respect of which it so failed.

(b) Any person holding a licence who does not satisfy in full the conditions laid down in the international standard relating to the class of licence or certificate which he holds shall have endorsed on or attached to his licence a complete enumeration of the particulars in which he does not satisfy such conditions.'

Article 40

'No aircraft or personnel having certificates or licences so endorsed shall participate in international navigation, except with the permission of the State or States whose territory is entered. The registration or use of any such aircraft, or of any certified aircraft part, in any State other than that in which it was originally certified shall be at the discretion of the State into which the aircraft or part is imported.'

It is true that Articles 41 and 42 also provide for certain exemptions from the consequences³ which are to befall a member that does not comply with the I.C.A.O. regulations. But these exceptions do not change the general picture. Whenever the Council adopts international standards relating to airworthiness or performance of aircraft or to licences or certificates of personnel, and Articles 39 and 40 apply, a member before rejecting those standards or accepting them with reservations must choose between the alternatives of either keeping its freedom of action and, if need be, risking its position in the competitive field of international air transportation, or of submitting to the law enacted by the Organization though such law is viewed with disapproval or doubt by the member concerned.

¹ Mankiewicz, *loc. cit.*, p. 88.

² See below, p. 255.

³ Jones, 'Amending the Chicago Convention and its Technical Standards—Can Consent of all Member States be Eliminated?', *Journal of Air Law and Commerce*, 16 (1949), p. 189, refers to them as 'sanctions'.

The legislative activity of the I.C.A.O. Council has led to the adoption of a set of provisions which greatly contribute to the safety, regularity and efficiency of international air navigation. The significance of the I.C.A.O. 'code'¹ is not restricted by the fact that the Organization has not been granted any regulative competence in matters relating to the policies and economics of scheduled international air navigation. Political and economic problems, in contrast with technical ones, do not lend themselves, in present circumstances of commercial air navigation, to regulation through enactments of international bodies, even though the guarantees of contracting-out are provided for. As the fate of the Chicago Air Services Transit Agreement and Air Transport Agreement has shown, a multilateral treaty is an instrument ill adapted to the needs of civil air navigation, and bilateralism remains the principal method of regulating the commercial aspects of air navigation. Some² would contend that the system of contracting-out is a step backwards in comparison with the annexes A–G to the Paris Convention on the Regulation of Aerial Navigation of 13 October 1919.³ The International Commission for Air Navigation set up under that Convention was competent to amend the Paris annexes by three-quarters of the total possible votes (Article 34), and such amendments were binding for all the parties to the Convention. However, the Commission had no power to draft and adopt new annexes and by that means develop the law of air navigation in the technical field. The highly qualified majority of three-quarters was equivalent to the hampering effects of the contracting-out system in the I.C.A.O. where, as we have seen, legislation is the responsibility of an organ in which only a fraction of the members are represented. On balance, and in view of the actual achievements of I.C.A.O., one is inclined to conclude that the regulative techniques and activity of I.C.A.O. have contributed to the progress of international law-making and its procedures.⁴

¹ Term used by Jenks, 'The Impact of International Organizations on Public and Private International Law', *Transactions of the Grotius Society*, 37 (1951), p. 35, and Lauterpacht in Oppenheim, *International Law* 8th ed., vol. 1, p. 1013.

² Cf. authors who wrote before the regulative activity of I.C.A.O. developed: Jenks, 'Some Constitutional Problems of International Organizations', this *Year Book*, 22 (1945), p. 65, and Parry, 'Constitutions of International Organizations', *ibid.* 23 (1946), p. 460. Cf. also Schenkman, *op. cit.*, pp. 259–60.

³ *L.N. Treaty Series*, vol. 11, p. 173. For comparative observations, see Jones, *loc. cit.*, pp. 187–90, and Ros, 'Le Pouvoir législatif international de l'O.A.C.I. et ses modalités', *Revue générale de l'air*, 16 (1953), p. 28.

⁴ Cf. Jenks, *loc. cit.* (n. 1 on this page), p. 35. The law-making by the I.C.A.O. is also discussed by Sir Humphrey Waldock, 'Public International Law. General Course', *Recueil des cours*, 106 (1962–II), pp. 98–9; Saba, 'L'activité quasi-législative des institutions spécialisées des Nations Unies', *ibid.*, 111 (1964–II), at pp. 674–8; Codding, 'Contributions of the World Health Organization and the International Civil Aviation Organization to the Development of International Law', *Proceedings of the American Society of International Law* (1965), p. 147; and, in particular, Detter, *Law-Making by International Organizations* (Stockholm, 1965), pp. 247–58.

World Health Organization (W.H.O.)

That the model supplied by I.C.A.O. proved useful is illustrated by its imitation in some other organizations. The first of these was W.H.O., the constituent instrument of which was signed in New York on 22 July 1946, though thereafter amended.¹ Article 21 bestowed on the World Health Assembly, the organ of W.H.O. where all the members are represented, the competence of adopting regulations concerning:

- (a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease;
- (b) nomenclatures with respect to diseases, causes of death and public health practices;
- (c) standards with respect to diagnostic procedures for international use;
- (d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce;
- (e) advertising and labelling of biological, pharmaceutical and similar products moving in international commerce.'

The Assembly adopts regulations on the above subjects by majority of the members present and voting. But it has the competence to determine that the adoption of regulations constitutes an 'important question' and that a decision thereon should in consequence be made by a two-thirds majority (Article 60).

So far the Assembly has adopted two enactments under Article 21, namely W.H.O. Regulations Nos. 1 and 2. Regulations No. 1 relate to nomenclature (including the compilation and publication of statistics) with respect to diseases and causes of death. They were adopted by the first World Health Assembly at Geneva on 24 July 1948 and thereafter amended.² Regulations No. 2, entitled International Sanitary Regulations, were adopted by the fourth World Health Assembly at Geneva on 25 May 1951,³ and since their adoption have been amended

¹ *U.N. Treaty Series*, vol. 14, p. 185. At the founding conference, the system of contracting-out met with the opposition of Belgium and Ukraine. While the former country had doubts regarding the system in which a State could become bound through lapse of time and its own omission to raise an objection, the latter saw a discrepancy between the system and national sovereignty, *W.H.O., Official Records*, No. 2, pp. 20-1. On the other hand, the Soviet Union at first proposed that the *W.H.O.* regulations acquire binding force *erga omnes* provided they were approved by the Governments of two-thirds of the members, *ibid.* p. 21. The Soviet delegation envisaged approval similar to ratification. It may also be added that besides the model supplied by the I.C.A.O., the draftsmen of the *W.H.O.* Constitution had in mind the procedure for amendments through tacit agreement provided for in Article 61 of the International Sanitary Convention for Aerial Navigation of 1933, *L.N. Treaty Series*, vol. 161, p. 65. For comments on the law-making activities of the *W.H.O.*, see Waldock, *loc. cit.*, p. 98; Saba, *loc. cit.*, pp. 678-80; Coddington, *loc. cit.*; and, especially, Detter, *op. cit.*, pp. 234-47.

² *U.N. Treaty Series*, vol. 66, p. 25.

³ *Ibid.*, vol. 175, p. 215. The up-to-date editions of Regulations No. 1 and 2 are published by

several times. Regulations No. 2 are today one of the more important sources of international sanitary law. They replaced, as between the States to which they are addressed, as many as twelve sanitary conventions signed at different times and binding different groups of contracting countries;¹ in addition, they amended a number of provisions in the Pan-American Sanitary Code of 1924. The International Sanitary Regulations contain detailed provisions with respect to quarantine and other means of preventing the spread of diseases. Under the twelve, often overlapping, conventions that were in force prior to the adoption of Regulations No. 2 the state of the law on quarantine was somewhat chaotic and often unclear. The W.H.O. Regulations adapted the law to contemporary conditions and unified, on a world scale, the provisions on quarantine and sanitary requirements to be fulfilled by international transport; hence they have been described as 'one of the major achievements of the international legislative process'.²

In view of the system of contracting-out adopted by the World Health Organization, the Regulations, when passed by the Assembly, are not automatically binding on member States, whether they voted for or against them. Members are notified of the adoption of Regulations and are allowed, within the period stated in the notice (which conforms to the one indicated in the enactment), to reject them or formulate their reservations (Article 22). After the expiry of the period, the Regulations are binding *in extenso* on those members which did not notify the Organization of their rejection, while they are obligatory only in part for the members which formulated effective reservations.

The description of the reservations as effective calls for a word of comment. Reservations to Regulations No. 1, if filed within the twelve-month period provided for in Article 20 of the Regulations, were to be effective and not subject to any control or acceptance on the part of anybody. On the other hand, the provisions on reservations in the International Sanitary Regulations were both more detailed and rigorous. Here, in contrast with Regulations No. 1, the members have not been granted complete freedom to make reservations. Under Article 107, paragraph 1, of the Regulations, if any State makes a reservation,

'such reservation shall not be valid unless it is accepted by the World Health Assembly, and these Regulations shall not enter into force with respect to that State until such reservation has been accepted by the Assembly or, if the Assembly objects to it on the

the W.H.O.; see Jacobini, 'The New International Sanitary Regulations', *American Journal of International Law*, 46 (1952), p. 727; Vignes, 'Le règlement sanitaire international. Aspects juridiques', *Annuaire français de droit international*, 11 (1965), p. 649.

¹ These conventions are enumerated in Article 105 of the Regulations.

² Jenks, *loc. cit.*, (above, p. 215, n. 1), p. 35. See also Mudaliar, 'World Health Problems', *International Conciliation* (May 1953), No. 491, pp. 246-7; *The First Ten Years of the World Health Organization* (Geneva, 1958), pp. 259 and 261; Codding, *loc. cit.*

ground that it substantially detracts from the character and purpose of these Regulations, until it has been withdrawn.'

The Assembly may make its acceptance of a reservation conditional on the State's undertaking to continue to fulfil any obligations corresponding to the subject-matter of the reservation to which it may be subject under one of the conventions replaced by the Regulations (Article 107, paragraph 3). The non-acceptance of a reservation by the Assembly, on the other hand, does not subject the State concerned to the Regulations. The State is bound by them only if it withdraws the non-accepted reservation. Otherwise, it remains outside the regulating effect of the W.H.O. enactment and continues to be a party to the pre-Regulations sanitary conventions.

Thus the International Sanitary Regulations introduced a useful innovation into the procedure relating to the making of reservations to instruments drawn up within international organizations. Here the decision regarding the propriety and acceptability of reservations is not left with individual members. The sole power to take this decision is vested in the Assembly—the organ best qualified to pass a final judgment on the subject. Altogether States have made 73 reservations, of which 38 have been rejected by the Assembly.¹ The attitude of the Assembly has caused States gradually to withdraw the non-accepted reservations and become bound by the Regulations. It may be concluded that the internationally controlled system of contracting out has proved a successful vehicle for legislation in an important field of public health.

World Meteorological Organization (W.M.O.)

Contracting-out is also a part of the regulative procedure of this Organization, set up under the convention of 11 October 1947 signed in Washington.² The Congress of the Organization, which is its 'supreme body' (Article 6), has the competence, under Article 7 (*d*), to 'adopt technical regulations covering meteorological practices and procedures'. The enactments of the Congress are adopted by a two-thirds majority of those present and voting (Article 10 (*b*)).

When the Organization began to function, the state of the law on meteorology was unsatisfactory, and it was not always clear what duties States had in this sphere.³ The second Congress divided the regulations to be formulated by the Organization into two categories: (1) standard meteorological practices and procedures which were to be binding on members

¹ *The First Ten Years of the World Health Organization* (Geneva, 1958), pp. 260–1. Reservations to W.H.O. Regulations are discussed by Detter, *op. cit.*, pp. 241–5.

² *U.N. Treaty Series*, vol. 77, p. 143. For comments on the law-making activities of the W.M.O., see Saba, *loc. cit.*, pp. 680–1, and Detter, *op. cit.*, pp. 228–34.

³ *First Congress of the World Meteorological Organization, Final Report* (1951), vol. 1, pp. 12 et seq., Resolution 15 (1).

unless they rejected them in accordance with Article 8 (*b*), and (2) recommended meteorological practices, compliance with which was to be advisable but not obligatory.¹ The influence of the pattern adopted in the International Civil Aviation Organization is clearly discernible in this dichotomy. W.M.O. has so far enacted two sets of technical regulations, one general and the other governing the meteorological service for international air navigation. They were voted by the second Congress in 1955, and they entered into force on 1 January 1956.²

While under Article 8 of the Convention 'members shall do their utmost to implement the decisions of the Congress', they are not obliged to comply with the technical regulations unconditionally. Paragraph (*b*) in the same Article adds the following stipulation:

'If, however, any member finds it impracticable to give effect to some requirement in a technical resolution adopted by Congress, such member shall inform the Secretary-General of the Organization whether its inability to give effect to it is provisional or final, and state its reasons therefor.'

Though Article 8 does not use the term 'reservation', its provision amounts to authorizing members to make reservations to the technical regulations.³ The Convention, in contrast with the constitutions of I.C.A.O. and W.H.O., is silent on the members' right to reject the regulations in their totality. None the less, in the practice of the Organization there have been instances of such rejections. Thus the Soviet Union explicitly invoked Article 8 when it informed the Secretary-General that it did not accept the regulations on the meteorological service for international air navigation.⁴ Moreover, the now extinct Federation of Rhodesia and Nyasaland entered a general reservation against the W.M.O. regulation.⁵ These cases do not seem to have met with any opposition, and consequently it may be concluded that in W.M.O. the system of contracting-out underwent a significant enlargement beyond the actual letter of Article 8.

North-East Atlantic Fisheries Commission

This Commission is the last of the legislating organizations to be reviewed in the present section. It was established under a Convention of 24 January 1959,⁶ and it has the power to adopt recommendations to which

¹ *Second Congress of the World Meteorological Organization* (1955), vol. 1, pp. 56-7, Resolution 17 (Cg-II).

² *W.M.O. Technical Regulations*: W.M.O.-No. 49. BD. 2, vol. 1, *General* (1st ed., 1956), and BD. 3, vol. 2, *Meteorological Service for International Air Navigation* (1st ed., 1956) Resolution 19 (Cg-II).

³ The procedure regarding the notification of reservations is regulated in Resolution 20 (Cg-II), *Second Congress of the World Meteorological Organization* (1955), vol. 1, pp. 58-9.

⁴ *Ibid.*, vol. 3, p. 146. The reason behind the Soviet action was the Soviet readiness to accept these regulations only as provisional rules.

⁵ *Ibid.*, p. 147.

⁶ Miscellaneous No. 3 (1959), Cmnd. 659. E. Lauterpacht, 'The Contemporary Practice of

States must give effect, the name 'recommendation' thus being used for a binding instrument. The Commission's recommendations are adopted by a two-thirds majority of the delegates present and voting. They deal with the size of mesh of fishing nets, the size-limits of fish, establishment of closed seasons or closed areas, or with the regulation of fishing gear. Any member State has the right to contract out by filing its objection within ninety days of the date of notice of the recommendation.

5. LEGAL NATURE OF ACTS ADOPTED BY UNANIMITY OR WITHIN THE SYSTEM OF CONTRACTING-OUT

Before further types of law-making resolutions of international organizations are examined, it may be useful to try to define the legal nature of the acts discussed in the two previous sections, i.e. acts adopted by a unanimous vote and acts subject to contracting-out. Are they simply treaties¹ concluded according to special procedures or do they constitute a source of law that differs from contractual engagements?

Unanimous enactments

The view has sometimes been expressed that law-making by unanimity in an international organization amounts to the conclusion of an agreement. According to Hans Kelsen 'a general norm adopted by a unanimous decision of an international organ composed of representatives of all parties to the treaty establishing the organ is not different from a norm created by a treaty entered into by States upon which the norm is binding'.² Discussing the law-making decisions of the now defunct Organization for European Economic Cooperation, Freymond regards these as 'true international treaties'.³ Tammes, commenting on the same organization, was of the opinion that its decisions stood 'much nearer to inter-governmental agreements than are most decisions nowadays of international organs'.⁴

the United Kingdom in the Field of International Law—Survey and Comment VIII', *International and Comparative Law Quarterly*, 9 (1960), pp. 276–7.

¹ By 'treaty' is meant 'any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more States or other subjects of international law and governed by international law': International Law Commission, 17th Session, *Law of Treaties. Draft Articles adopted by the Commission*, U.N. Doc. A/CN. 4/L. 107, p. 2, Article 1, § 1 (a).

² Kelsen, *op. cit.*, p. 366. Cf. also Schultz, *op. cit.*, p. 66.

³ Freymond, *loc. cit.*, p. 70; he also describes them as 'traités internationaux appelés décisions de l'Organisation'. On p. 82 he refers to the *Code of Liberalisation* as 'un traité-loi conclue selon une procédure particulière'.

⁴ Tammes, *loc. cit.*, p. 90. It follows *a contrario* from the views expounded by Potter, *op. cit.*, pp. 209 and 265, that he does not list unanimous resolutions under the category of international legislation.

While Tammes's view can be regarded as correct, it does not amount to saying that unanimous regulative acts of international organizations are agreements which States conclude in simplified form or according to special procedures. The identification of unanimous acts with treaties by other writers has its basis in the undisputed fact that the consent of all the participating countries is a requirement which the two kinds of instruments share in common. A State that votes for the adoption of a law-making resolution by an international organ acts in a double capacity. On the one hand, it expresses its assent to the rights and duties formulated in the enactment and, on the other, it contributes to the creation of what now becomes the *voluntas* of the organization, i.e. an act the authorship of which must be attributed to the organization as a corporate body and not to individual consenting members nor to the members collectively. In unanimous decisions these two elements are so well balanced that it is not possible to regard either of them as being preponderant with respect to the other. But the undeniable analogies between a unanimous law-making resolution and a treaty come to an end when the former has been definitely adopted and becomes part of the law of the organization. From that moment the validity, binding force, application and termination of the regulative act of the international organization, whether unanimous or not, is governed not by the law of treaties but solely by the law of the international organization which is the author of the act. Instruments which are not subject to the law of treaties are not treaties.

Nor does the practice of States attribute the rank and character of treaties to the acts under consideration. This is of particular importance, since the constitutions of the organizations are general enough to have made either development of the legal nature of unanimous acts possible. Furthermore, under the municipal law of many of the countries concerned the subject-matter of the regulative acts (economic affairs, transport, public health, etc.), if embodied in a treaty, would not have admitted of any simplified form or procedure, but would have required the regular channel of Government approval or ratification by the Head of State including, in certain cases, parliamentary control. Only when these stages had been successfully passed would the instrument become binding on the State. In fact the regulative acts under consideration acquire binding force as soon as the requirements for their valid adoption by the organization are fulfilled. If the unanimous enactments were inter-State agreements, their binding effect would often depend on the action of some internal organ of the State. Thus, for instance, the O.E.E.C. Code of Liberalization—if regarded as a contractual instrument identical with, or analogous to, a treaty—should have obtained some kind of approval on the part of national legislatures, because in its substance and effect the Code was equivalent

to a multilateral treaty of commerce.¹ But this did not occur in any of the member countries. In Federal Germany the Code was officially published,² while in Switzerland it was made public in a somewhat incidental way, being published as an annex to the Agreement on the European Payments Union when the latter was approved by the Federal Council.³ Nevertheless, the Code and all the other unanimous regulative acts became binding on the member States at the moment the Organization adopted them, unless another date for entry into force was indicated. It is true that legislation of the European Communities is often subjected to scrutiny and approval on the part of parliamentary bodies in the member States.⁴ However, no matter what is done to such legislation in the internal sphere of member countries, its validity and force depend exclusively on the decision taken in and by the legislating international organ and are regulated solely by that organ's law.⁵ Thus unanimous enactments, though in several respects not dissimilar from agreements, display features which justify their exclusion from contractual instruments *sensu stricto*. Neither the law of the legislating organizations nor the practice of the States has assimilated them to treaties.⁶

Enactments allowing contracting-out

The arguments adduced in favour of differentiating between treaties and unanimous acts apply *a fortiori* to law made by international organizations in the framework of a system of contracting-out. It is true that in this system the State is often bound through its tacit agreement: when it does not raise an objection or make a reservation and the time-limit prescribed for rejection or reservation has passed, the State may be regarded as having

¹ Cf. Freymond, loc. cit., pp. 79–80. At p. 80 he states that the Code ought to have been consented to by the Federal Assembly according to Article 85 (5) of the Federal Constitution.

² *Bundesanzeiger*, 15 November 1951; Freymond, loc. cit., p. 79.

³ Ibid.

⁴ For examples relating to Federal Germany, see Bräutigam, 'Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1957', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 20 (1959–60), at pp. 139–46 and 152–7, and Jurina, 'Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1961', *ibid.* 23 (1963), at pp. 440–4 and 448.

⁵ But exceptions are not impossible, and if they arise the possession of the powers of *sensu stricto* legislation by the organization can be questioned. Some regulations of the Rhine Commission could be a case in point. Cf. also Article 6, § 3, of the Convention on the O.E.C.D.: 'No decision shall be binding on any Member until it has complied with the requirements of its own constitutional procedures.' But it should be noted that a similar rule which applied to the regulative acts of the now dissolved O.E.E.C. remained a dead letter: these acts were never subjected to ratification or similar procedures, see Freymond, loc. cit., pp. 74–5, and Elkin, 'The Organization for European Economic Co-operation. Its Structure and Powers', *European Yearbook*, 4 (1956), p. 126.

⁶ The view that the acts under consideration are not treaties finds support in the opinions expressed by Rousseau, in *Revue générale de droit international publique*, 66 (1962), pp. 868–9; Detter, op. cit., p. 321; Parry, op. cit. above p. 199, n. 7, at p. 22; and Dehaussy, 'Les Actes juridiques unilatéraux en droit international public: A propos d'une théorie restrictive', *Journal du droit international*, 92 (1965), at p. 53.

consented to the enactment. But its tacit assent becomes a legal fiction if the State has not objected to the enactment merely by failing to do so, or has been late in notifying its rejection or reservation. Three member States of the World Health Organization did not keep the deadline in submitting reservations to the International Sanitary Regulations and were, consequently, regarded as bound by the Regulations *in extenso*. They had no means of preventing the application of the Regulations to themselves. Were the Regulations a treaty, the non-acceptance of the reservations would leave the States concerned the choice of either accepting the Regulations as they stood or not accepting them at all. In W.H.O. no choice was given to them—they were declared bound by the Regulations without any reservations. Norway—one of the three members involved—insisted that the Regulations must first be brought before the Storting (Parliament), approved by it (which included the passing of appropriate legislation), and ratified by the King. But the Organization did not accept the Norwegian position, and the Regulations acquired binding force for Norway in contravention of her domestic law, especially of Article 26 of the Constitution.¹ The system of contracting-out thus makes it legally possible that States will be bound against their will, which is incompatible with the notion of contractual obligations. In the system of contracting-out the State declares its 'will' only when it wishes to benefit from the system, i.e. reject the enactment. This is a reversal of the procedure applicable to treaty-making, where no declaration or other act on the part of the State is needed to protect it from becoming bound by the instrument in question. When a treaty is negotiated and the State is passive—does not sign it, or after having appended its signature does not proceed to ratification—nothing happens and the State is free from obligations which would otherwise devolve upon it had it signed and ratified the treaty. The conclusion of treaties involves contracting-in, not contracting-out.² There is a basic difference between the concept of a State's being bound because it expresses its consent to a treaty, and of a law made by an international organ from the obligations of which the State can, owing to special procedures, free itself by its own act. The analogy to treaties is limited to the right of making reservations, but this alone, it is submitted, does not suffice to impart the character of a treaty to the act of the organization.

¹ W.H.O., *Official Records*, No. 42, p. 358 and No. 45, p. 41. After the Regulations had become obligatory for Norway, the Storting and the King complied with the constitutional requirements, and thenceforth the binding force of the Regulations could not be questioned under the domestic law of Norway. For the attitude of Norway in this incident, see the text of the letter of the Norwegian Health Service to the W.H.O. of 8 March 1952, *ibid.*, No. 42, p. 359, reprinted in Blix, *Treaty-Making Power* (London, 1960), who discusses the incident at pp. 295–6.

² Cf. the juxtaposition of the two systems, in another context, by Sir Arnold (now Lord) McNair in his Individual Opinion in the *Anglo-Iranian Oil Co. case* (Preliminary Objection) *I.C.J. Reports*, 1952, at p. 116.

The somewhat special case created by Article 110 of the International Sanitary Regulations also requires mention. This Article opens the Regulations for acceptance, without any deadline, by non-members of W.H.O. who are parties to any of the sanitary conventions or agreements listed in Article 105. Any such non-member which has become a party to the Regulations may, however, withdraw from participation in them at any time by means of a notification addressed to the Director-General of W.H.O.; the withdrawal then takes effect six months after the notification has been received. The language of Article 110 does not leave much doubt that for non-members the Regulations, if accepted by them, acquire the character of a contractual obligation. Thus for one group of States the act is of a non-contractual nature, but for another the same act must be classified under the head of treaties. This may be one of the reasons why several writers contend that the regulations of W.H.O. are inter-governmental agreements.¹ Another possible reason, though not very convincing, is that W.H.O. Regulations have been registered with the United Nations and published in its *Treaty Series*.² The W.H.O. technique has been described by the Director-General as 'a flexible means of treaty-making particularly suited to a technical international agreement which has to keep pace with the changing epidemiological situation . . .'.³ But the terms used by the Director-General as well as the not infrequent reference to members who are bound by the Regulations as 'parties'⁴ cannot of themselves be regarded as bestowing on the acts in question the nature of treaties. Moreover, there remain the regulations of I.C.A.O., W.M.O. and the Fisheries Commission. They do not display the quasi-contractual features which have been observed in the case of the International Sanitary Regulations. The I.C.A.O. regulations, it is true, bear the name of annexes to the Chicago Convention. But Article 54 (1) explains that they have been so designated 'for convenience', and that name does not therefore by itself confer on the regulations the legal character possessed by the Convention. It may be that enactments made within the system of contracting-out are not more than 'half-way towards true legislation'.⁵ If this description is correct, they equally do not belong to the realm of treaty-making.

¹ Ago, 'Die internationalen Organisationen und ihre Funktionen im inneren Tätigkeitsgebiet der Staaten', *Rechtsfragen der Internationalen Organisation. Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Frankfurt, 1956), p. 28; Blix, op. cit., pp. 293-6; Guggenheim and Marek, 'Völkerrechtliche Verträge', *Strupp-Schlochauer, Wörterbuch des Völkerrechts* (2nd ed., Berlin, 1962), vol. 3, pp. 535-6; Tunkin, op. cit., p. 131; see also Vignes, loc. cit., p. 654. The element of consent by States in the making of the I.C.A.O. regulations is emphasized by Jones, loc. cit., p. 190; Pépin, 'I.C.A.O. and Other Agencies Dealing with Air Regulation', *Journal of Air Law and Commerce*, 19 (1952), pp. 152-5; Schenkman, op. cit., p. 262.

² Vols. 66 and 175, Nos. 847 and 2303.

³ W.H.O., *Official Records*, No. 37, p. 332, cited by Blix, op. cit., p. 294.

⁴ E.g. W.H.O., *Official Records*, No. 37, p. 332.

⁵ Sir Humphrey Waldock, 'Public International Law. General Course', *Recueil des cours*, 106 (1962-II), p. 99.

The identification with treaties of the acts discussed above, in particular those adopted by unanimity, is due to some extent to the mistake of confusing the question what these acts are as international legal instruments with the question what are their legal effects. Their legal effects are certainly identical with those produced by treaties, in the sense that they create legal rights and duties for States. Writing about the O.E.E.C. decisions one writer observed that they had 'the same effects and the same value as international treaties'.¹ But identity of effects does not presuppose identity of source from which the rule originated.

Finally, it may be noticed that on occasions *non-binding* resolutions of international organizations acquire obligatory force through the specific consent of members. In that case the contractual nature of the instrument cannot be doubted. The resolution in question is by definition non-binding, e.g. a recommendation of the General Assembly of the United Nations; and it is only through the agreement of the members, and irrespective of the actual nature of the resolution of the organization, that it is transformed into an instrument that bears on the rights and/or duties of States. If States declare and agree that a recommendation will henceforth constitute an agreement, they change the nature of the act: as an instrument of the organization it is not binding, but as an agreement between States it is. Agreement may be reached within, or expressed through, an otherwise non-binding resolution. Take, for example, Resolution 1962 (XVIII) of the United Nations General Assembly setting forth the Draft Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. During the debate on that resolution several members expressed the opinion that an agreement had been promulgated in the form of the Assembly resolution, which—being a *Draft Declaration* and a recommendation—could never be binding of itself.² It must, however, be emphasized that this is not a case of the kind discussed in the present section. At no stage of their drafting and adoption are the instruments which are the subject of the present Section recommendations.³ They are binding from their inception, once they have been adopted by the organ of the organization in accordance with the procedures laid down in its constitution.

¹ Freymond, loc. cit., p. 90. This view is repeated by Elkin, op. cit., p. 125.

² Cf. U.N. Docs. A/C. 1/SR. 1342, pp. 3, 7, 8, 15, and 16; A/C. 1/SR. 1343, pp. 4, 7, and 14 ('a compromise agreed upon after two years of debate'); and A/C. 1/SR. 1345, p. 4. Cf., however, doubts voiced by Parry, op. cit. above, p. 199, n. 7, at p. 23, with regard to resolutions of this type in general.

³ Sand, Lyon, and Pratt, 'An Historical Survey of International Air Law Since 1944', *McGill Law Journal*, 7 (1961), pp. 129–30, wrongly describe the I.C.A.O. standards as recommendations.

6. LAW-MAKING BY MAJORITY: INTERNAL LAW OF INTERNATIONAL ORGANIZATIONS

The term 'internal law of international organizations' has acquired currency in the terminology of international law, though there is no agreement as to how to define that law. In a recent study of the subject, the view was developed at some length that the internal law of an organization comprises any enactments made by the organization, including those directly addressed to States and directly regulating their conduct.¹ From this standpoint the internal law of an organization would include at least some of the enactments discussed in the previous sections, and also law made by the European Communities laying down rights and duties of member countries for the purpose of attaining the aims of the Communities. However, since the law in question is termed 'internal', the name should be confined to rules relating to a restricted area of activity and not to all law made by the organization. Here, therefore, a narrower definition will be adopted, according to which the internal law of an international organization consists of rules enacted by the organization and concerned with the structure, functioning, or procedure of the organization. In other words, it is law which on its face regulates the activities of bodies and persons acting on behalf of, or staff employed by, the organization, or which regulates the setting up of the subsidiary machinery which the organization needs in order to function and attain its purposes. It also provides rules for the conduct of business assigned to the organization by its constitution. The internal law is addressed not to States but to organs, representatives, or employees of the organization. None the less it often regulates the conduct of States and, consequently, constitutes a source of their rights and duties, whenever States act in the framework of the organization, i.e. when they move in the area covered by the internal law. The application or non-application of a rule of internal law of the organization is often of far-reaching importance to the political interests of States, and exercises influence on the merits of a position adopted by a member.²

Among the mass of internal rules made by contemporary inter-governmental organizations, it is convenient to distinguish, *ratione materiae*, certain main categories.

1. *Rules of procedure.* These together with the unanimous enactments of the nineteenth-century river commissions, are the oldest law originating in

¹ Cahier, 'Le droit interne des organisations internationales', *Revue générale de droit international public*, 67 (1963), pp. 563-602, at pp. 581-2.

² See Jessup, *op. cit.* Cf. also Hold-Ferneck, *Lehrbuch des Völkerrechts* (Leipzig, 1932), 2nd part, p. 138; Adam, *L'Organisation européenne de coopération économique* (Paris, 1949), p. 183, n. 12; Reuter, 'Organisations internationales et évolution du droit', *L'Évolution du droit public. Études offertes à Achille Mestre* (Paris, 1956), p. 449; Sorensen, *op. cit.*, pp. 92-3.

international organizations. Rules governing procedure were first known to international conferences and found their way into permanent inter-governmental organizations as soon as the latter began to function, e.g. the procedural regulations of the Universal Postal Union.¹ Today, in many organizations separate sets of rules of procedure are in force for the use of each of the more important organs of the same organization. Suffice it to point to the rules of procedure of the General Assembly, the three Councils, and the numerous subsidiary organs of the United Nations, and of the International Court of Justice. The rules of the Assembly constitute a body of 164 detailed provisions, and they are the largest enactment of this kind in force.²

2. *Financial regulations.* These relate particularly to budgetary matters.³ Some would contend that the budget itself is a legislative act. If so, it would amount to something more than mere internal law of the organization, for the budget directly concerns the financial rights and duties of member States.

3. *Regulations concerning the staff and personnel of the organization.*⁴

4. *Regulations relating to administrative problems other than those indicated under (2) and (3).* Examples of these are headquarters regulations,⁵ flag codes,⁶ etc.

5. *Rules enacted to implement the tasks and functions assigned to the organization by the constituent treaty.* Examples of these rules are the regulations to give effect to Article 102 of the United Nations Charter,⁷ containing detailed provisions on the registration and publication of treaties by the Secretariat of the United Nations; and the United Nations rules on technical aid.⁸

6. *Rules governing the establishment and functioning of new organs or autonomous bodies acting within the framework of the organization.* The

¹ Dunn, *The Practice and Procedures of International Conference* (London, 1929), pp. 147-55; Kolasa, 'Rozwój regulaminów organizacji międzynarodowych' (Development of Regulations of International Organizations), *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 27 (1965), No. 3, pp. 81-101, at pp. 86-7.

² Jessup, *op. cit.*; Kappelmann, *Die Geschäftsordnungen internationaler Organisationen, unter besonderer Berücksichtigung der Geschäftsordnung der Allgemeinen Versammlung der Vereinten Nationen* (Mainz, 1956); Kolasa, 'Regulamin Zgromadzenia Ogólnego O.N.Z.' (Rules of Procedure of the U.N. General Assembly), *Państwo i Prawo*, 18 (1963-II), pp. 556-67.

³ E.g. *Financial Regulations of the United Nations*, G. A. Resolution 456 (V).

⁴ E.g. *Staff Regulations of the United Nations*, G.A. Resolution 590 (VI); *Regulations for the United Nations Joint Staff Pension Fund*, G.A. Resolutions 248 (III), 772 (VIII), and 955 (X).

⁵ E.g. *Headquarters Regulations*, G.A. Resolution 604 (VI).

⁶ E.g. *United Nations Flag Code*. Cf. G.A. Resolution 483 (V) on the United Nations distinguishing ribbon and other insignia.

⁷ G.A. Resolutions 97 (I) and 482 (V). The Regulations were described as exceeding in scope the general provisions of Article 102, *G.A.O.R.*, 14th Sess., 6th Committee (New York, 1959), p. 99, observations by the delegate of Poland. Cf. also Piotrowski, 'Les résolutions de l'Assemblée Générale des Nations Unies et la portée du droit conventionnel', *Revue de droit international, des sciences diplomatiques et politiques*, 33 (1955), at p. 223.

⁸ Economic and Social Council Resolution 222 (IX).

element of new law is especially strong in decisions whereby an organization creates bodies of the latter kind. The operational agencies of the United Nations, e.g. the United Nations Development Programme¹ or U.N.I.C.E.F.,² are cases in point. Their setting up was not explicitly provided for by the United Nations Charter. While they remain under the supervision of the United Nations Organization and can be dissolved by it, they have power to make final decisions within their competence and they also have capacity to carry out certain legal transactions. In particular, they hold property, enter into contracts, and sue in courts; their power of decision includes the disposal of funds which they acquire not from the regular budget of the Organization but from voluntary contributions by member States and on occasions also from other sources. As regards categories of organs which do not fall under the heading of operational agencies, mention should be made of the United Nations Administrative Tribunal.³ The number of regulative acts which create new organs is legion, and it has rightly been observed that 'there is practically no limit set to this capacity of reproduction and, therefore, to the creation of new international constitutional law'.⁴

7. *Provisions regarding the relationship between organizations.* Finally, there is a category of rules which has so far undergone little development but which may gain in importance with the progress of international organization. In substance they are provisions bearing on the relationship between two or more organizations. They are enacted by one organization for another that is subordinate to, or dependent on, or supervised by, the former. The possibility of such enactments exists, first, when one organization creates another and retains at least a measure of supervision over it; and, secondly, in the relations between the United Nations and the Specialized Agencies.⁵ Up to the present, however, the mutual relations of the United Nations and the Specialized Agencies have been governed by contractual arrangements and not by legislative enactments.⁶

The internal law of international organizations is thus a vast and varied body of rules which continues to grow.⁷ Its significance as part of

¹ G.A. Resolution 2029 (XX).

² G.A. Resolutions 57 (I), 417 (V) and 802 (VIII).

³ G.A. Resolutions 351 (IV) and 957 (X).

⁴ Tammes, *op. cit.*, p. 314. See, generally, his views on pp. 310-16.

⁵ Cohen, 'Reflections on Law and the United Nations System', *Proceedings of the American Society of International Law* (1960), p. 250.

⁶ Jenks, 'Co-ordination: A New Problem of International Organization. A Preliminary Survey of the Law and Practice of Interorganizational Relationships', *Recueil des cours*, 77 (1950-II), pp. 157-302; Dupuy, 'Le droit des relations entre les organisations internationales', *ibid.* 100 (1960-II), pp. 457-589.

⁷ See writings quoted above, pp. 226, nn. 1, 2, p. 227, nn. 1, 2, 7, this page, nn. 4-6; and see Scerni, *Saggio sulla natura delle norme emanate degli organi creati con atti internazionali* (Genoa, 1930); Monaco, 'I regolamenti interni degli enti internazionali', *Jus Gentium: Annuario italiano di diritto internazionale*, 1 (1938), pp. 52-108; Krylov, 'K obsuzhdeniyu voprosov teorii mezh-

the law of international organizations and international law in general is far from negligible. As to its substance, most of the law contained in internal regulations is new by comparison with the provisions of the constitutions of the organizations concerned. The internal law is enacted by virtue of majority decisions, and rare are the organizations where the constituent treaty still requires unanimity for the adoption of internal regulations (e.g. the Council for Mutual Economic Assistance, Article IV, paragraph 2; the Organization for Economic Co-operation and Development, Article 6, paragraph 1). Indeed, instances can be found in practice where internal regulations have been adopted against the opposition of a strong minority. Thus the first set of provisional rules of procedure of the United Nations General Assembly was enacted against the votes of 18 delegations, with 29 votes cast in favour and 4 members abstaining.¹ None the less they were binding upon all.

Most constitutions or statutes of international organizations contain an explicit authorization for the making of internal law on some subject or other. It would serve no purpose to give an exhaustive list of references to the enabling clauses in treaties. Instances bearing on a general international organization are Articles 21, 22, 30, 62, paragraph 4, 72, paragraph 1, 90, paragraph 1, and 101, paragraph 1, of the Charter of the United Nations, and Article 30, paragraph 1, of the Statute of the International Court of Justice. An instance illustrating a similar competence with respect to a specialized organization is Article 5, section 2 (f), of the Articles of Agreement of the International Monetary Fund. Finally, Articles 16, 25 and 40 of the Treaty establishing the European Coal and Steel Community may be cited as examples of such enabling clauses in the case of regional bodies.

The General Assembly of the United Nations acted by virtue of the specific authorizations contained in the Charter when it adopted its rules of procedure (Article 21),² set up subsidiary organs and regulated their organization, structure and terms of reference (Article 22),³ enacted rules for the calling of international conferences of States by the Economic and

dunarodnogo prava', *Sovetskoe gosudarstvo i pravo* (1954), No. 7, pp. 74-9; Ivraakis, 'The Regulation-Making Power of the United Nations', *Revue hellénique de droit international*, 9 (1956), pp. 80-92; Virally, 'La valeur juridique des recommandations des organisations internationales', *Annuaire français de droit international*, 2 (1956), pp. 66-96; Bastid, 'De quelques problèmes juridiques posés par le développement des organisations internationales', *Grundprobleme des Internationalen Rechts, Festschrift für Jean Spiropoulos* (Bonn, 1957), pp. 37-42; Focsaneanu, 'Le Droit interne de l'Organisation des Nations Unies', *Annuaire français de droit international*, 3 (1957), pp. 315-49; Monaco, 'L'autonomia normativa degli enti internazionali', *Scritti di diritto internazionale in onore di Tomaso Perassi* (Milan, 1957), pp. 135 et seq.; Merle, 'Le pouvoir réglementaire des institutions internationales', *Annuaire français de droit international*, 4 (1958), pp. 341-60; Decleva, *Il diritto interno delle unioni internazionali* (Padua, 1962); Detter, op. cit., pp. 44-118; Wengler, *Völkerrecht* (Berlin, 1964), pp. 334-9.

¹ G.A.O.R., 1st Sess., 1st part, Plenary meetings, pp. 50-68; Kolasa, loc. cit. above, p. 227, n. 2, at p. 559. Below, p. 231, n. 3, *in fine*.

² Above, p. 227, n. 2.

³ E.g. G.A. Resolution 174 (II) containing the statute of the International Law Commission.

Social Council (Article 62, paragraph 4),¹ and laid down provisions governing the status and other problems of the personnel of the United Nations (Article 101, paragraph 1).² In this connection also it may be noted that the Headquarters Regulations of the United Nations were enacted by virtue of Article III, Section 8, of the Headquarters Agreement concluded between the United Nations Organization and the United States of America. This was a rare instance of an enactment of an internal law based on an agreement signed by the Organization with one member alone instead of with all members. But the agreement had the approval of the General Assembly. The Headquarters Regulations had important implications for the member concerned, the United States, in that they involved the non-application, in the Headquarters District, of United States Federal, State and local laws inconsistent with the Regulations.³ Yet the Charter itself did not provide for the making of regulations on headquarters. Nor did it contain any explicit authorization to issue internal regulations in other matters, but the Assembly acted on the assumption that it had the competence to make financial regulations as a corollary of its budgetary powers (Article 17, paragraphs 1 and 2),⁴ to frame provisions on the insignia of the United Nations Organization following the resolution of the Security Council on their use during the Korean hostilities,⁵ and to enact the regulations referred to above for the purpose of giving effect to Article 102 of the Charter regarding the registration of treaties.⁶ The practice, then, of the United Nations—an organization notorious for its lack of legislative powers with regard to States—shows that there are subjects on which internal law has been made without any explicit treaty authorization, and that the members did not question the legality of the action.⁷ This observation applies today to almost all existing international organizations.

Hence contemporary practice warrants the statement that whenever a treaty which sets up an organization is silent as to the latter's authority to

¹ G.A. Resolution 366 (IV).

² Above, p. 227, n. 4.

³ For the text of the Headquarters Agreement, see *U.N. Treaty Series*, vol. 11, p. 11. Regulation No. 1 was made by the Secretary-General and confirmed by the Assembly, while Regulations Nos. 2 and 3 were made ('approved') by the Assembly itself; see G.A. Resolution 604 (VI).

⁴ Above, p. 227, n. 3. Cf. also G.A. Resolution 1874 (S-IV).

⁵ S.C. Resolution 483 (V). During the debate in the 6th Committee the specific competence of the Assembly to issue regulations was not questioned; but objections were raised to its jurisdiction over the Korean dispute; cf. *G.A.O.R.*, 5th Sess., 6th Committee, 247th meeting, 30 November 1950, pp. 255-61. See, however, the opinion expressed by the delegate of Czechoslovakia, *ibid.*, p. 258.

⁶ Above, p. 227, n. 7.

⁷ For a rare example of the opposition by a member State who contended, in the context of regulations issued by the Organization, that the United Nations and its organs had no powers other than those conferred upon them by the Charter, see the Czechoslovak view referred to in n. 5 on this page. But on other occasions Czechoslovakia did not question the lawfulness of internal regulations made by the Assembly without explicit authorization contained in a provision of the Charter.

enact internal law, the power to do so is implied. The pronouncements of the International Court of Justice on the implied powers of international organizations,¹ in particular of the United Nations, seem to corroborate this view, though the Court has not had occasion to deal specifically with powers to legislate. The writer of the present paper has already expressed the opinion elsewhere, that 'if the organization is supposed to function normally and properly, if it is to respond to tasks set forth by its constitution, it must possess the power to regulate the procedure of its organs, change and adapt their structure, create new bodies within constitutional limits, formulate detailed rules in application of more general principles contained in the treaty setting up the organization, and regulate the status of its functionaries'.² The League of Nations had no power to make law for States and yet there was beyond question general agreement that it could enact internal regulations.³

Some writers have expressed the view that it is not necessary to imply the power to make internal regulations, for such competence is now possessed by any and every international organization by virtue of customary law. A custom is said to have developed in particular in connection with the adoption of rules of procedure by international conferences,⁴ which confers on international bodies the power to make their internal law irrespective of the existence of any enabling clauses in the constitutional treaties.⁵ The correctness of this opinion is open to doubt. Obviously, it cannot today be

¹ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, *I.C.J. Reports*, 1949, p. 174, at p. 179; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, *ibid.*, 1954, p. 47 at pp. 56 and 57; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *ibid.*, p. 151, at pp. 168 and 182. In the *Effect of Awards* case the Court had to answer the question 'whether the provisions of the Charter concerning the relations between the staff members and the Organization implied for the Organization the power to establish a judicial tribunal to adjudicate upon disputes arising out of the contracts of service'. The reply was as follows: 'The Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter'. Cf. Tammes, *op. cit.*, p. 311.

² 'Forms of Participation of International Organizations in the Lawmaking Process', *International Organization*, 18 (1964), p. 798. Kelsen, *Recent Trends in the Law of the United Nations* (London, 1951), p. 938, raises some doubts with regard to the implied power of the United Nations to draw up the Flag Code. For more general expression of doubts on the application to legislation of the doctrine of implied powers, see Scheuner, 'Die Rechtssetzungsbefugnis internationaler Gemeinschaften', *Völkerrecht und rechtliches Weltbild. Festschrift für Alfred Verdross* (Vienna, 1960), pp. 236-7: if there is no explicit authorization in the constitutional treaty he allows the issuance of rules of procedure only.

³ Cf. Article 5, § 2, of the Covenant which, however, constituted a point of departure for the regulative activity of the League in its internal affairs. On the power of the League to make internal law, in particular rules of procedure, see Hudson, *op. cit.*, p. xxxvii; Scelle, *Précis de droit des gens* (Paris, 1934), Part 2, p. 497; Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents* (2nd ed., London, 1949), p. 231; Kolasa, *Rules of Procedure of the United Nations General Assembly. A Legal Analysis* (Wrocław, 1967), pp. 40-7.

⁴ Kolasa, *ibid.*, pp. 67-70.

⁵ Cahier, *loc. cit.*, p. 583.

questioned that a customary rule exists according to which international conferences and, by way of admissible analogy, organizations are empowered to adopt their rules of procedure. But it is difficult to recognize the existence of a similar customary rule which would serve as a foundation for law-making covering the whole field of the internal regulations of international organizations; for that law, as we have seen, covers today subjects much more varied than the mere procedure of inter-governmental organs, and it does not appear that specific customs have already been formed that would authorize the making of other categories of internal law differing widely *ratione materiae*. A more correct view of the matter, it is thought, is that the power to make such law should be assumed whenever the tasks and functions of the organization warrant appropriate internal legislation; and that these tasks and functions constitute a limit to the regulative power of the organization which is more definable than that given by the somewhat nebulous concept of a customary rule.

Specific provisions in the constitutions of international organizations enabling the organization to make internal law can be interpreted in two ways. Either they remove doubts regarding its regulative competence in a particular field or they state its obligation to enact internal law in a particular field.¹ Under no circumstances, in view of the well-established practice of international organizations, can such enabling clauses be interpreted as restricting the enactment of internal law exclusively to cases where there is an express treaty authorization.²

It should be emphasized that the implication of regulative powers within the limits here described applies solely to the making of the internal law of international organizations as defined at the beginning of the present section. There is no such implication with respect to regulative acts that are addressed directly to States and create their rights and duties. The organization can make such acts only if it has been expressly empowered to do so by the constituent treaty.

7. LAW-MAKING BY MAJORITY: THE LEGISLATIVE ACTIVITY OF THE EUROPEAN COMMUNITIES

While a number of their enactments have been, and still are, adopted by unanimity, the process of law-making in the European Communities belongs rather to the category of majority decisions. In the Coal and Steel Community law is made principally by majority. The Rome Treaty of 1957 on the Economic Community provides for a considerable increase in

¹ Kolasa, loc. cit., above, p. 227, n. 2, at pp. 565-6.

² On the implied powers to make internal regulations, cf. Anzilotti, *Cours de droit international* (Paris, 1928), p. 295; Reuter, *Institutions internationales* (Paris, 1956), p. 314; Lukin, *Istochniki mezhdunarodnogo prava* (Moscow, 1960), pp. 114 and 115.

the number of majority decisions after the termination of the second stage of the transitional period.¹ Legislation is not an important function among the activities of the Atomic Energy Community; however, in the few instances where the Community is given law-making powers, majority decisions prevail.

*The European Coal and Steel Community*²

The Special Council (or the Council under the Treaty of 1965) has, for the most part, powers not concerned with the making of law. Its decisions, unless the Treaty requires a qualified majority or unanimity, are taken 'by a vote of the majority of the total membership' (Article 28, fifth subparagraph). It is the High Authority (or the Commission under the Treaty of 1965) which is the main holder of powers of legislation in this European Community. The High Authority is composed of nine members; eight of them are designated by agreement of the member Governments. Their term of office is six years and they are eligible for reappointment. They all exercise their functions in complete independence from any Government or organization, in the general interest of the Community. Their functions thus have a supranational character (Articles 9 and 10). The legislation of the High Authority is effected in the form of decisions and, to some extent, recommendations (Article 14).

Decisions are binding in all their details. Recommendations are binding only with respect to the objectives which they specify;³ therefore their other provisions, in particular the paragraphs devoted to means of attaining these objectives, have not the nature of law. The regulative acts of the High Authority must state the reasons which led to their enactment, and they must also take note of any opinions which the High Authority was required to obtain. Under Article 15, paragraph 3, the regulative acts of the High Authority take effect automatically upon publication, though they may also indicate a different date. Decision No. 22-60 of 7 September 1960

¹ For the notion of the transitional period and its division into three stages, see Article 8. The first stage lasted from 1958 to 1961; see *Journal officiel des C.E.* (1962), p. 164. The second stage started in 1962 and was scheduled to terminate at the end of 1965, when a number of difficulties arose which prevented a smooth transition from the second to the third stage at the beginning of 1966. For the text of the Luxembourg agreements (*Conclusions*) regarding the solution of these difficulties, see *Revue du Marché Commun* (1966), No. 87, pp. 6 and 7.

² For text, see above, p. 206, n. 4. References to the regulative acts of the Community given below are *exempli gratia* and do not purport to be exhaustive. This reservation applies equally to the enactments of the Communities which were listed above, in the Section devoted to unanimous acts. This writer found his examples particularly in the legislative activities of the Communities during their first ten years, 1952-1962.

³ This is one of the rare instances where a recommendation of an international body is binding; cf. Virally, 'La valeur juridique des recommandations des organisations internationales', *Annuaire français de droit international*, 2 (1956), pp. 84-5, and Reuter, 'Les interventions de la Haute Autorité' in *Actes du congrès international d'études sur la Communauté Européenne du Charbon et de l'Acier* (Milan, 1957), p. 30.

regulates the form, notification and publication of the acts of the High Authority.¹

The High Authority makes law by a vote of a majority of its membership (Article 13) on the following subjects: general programmes with respect to modernization, long-term orientation of manufacturing, and expansion of productive capacity (Article 46(3^o)); levies on the production of coal and steel (Articles 49 and 50);² participation in the institution, or autonomous institution, of any financial mechanisms common to several enterprises which are deemed necessary for the accomplishment of the missions defined in Article 3 and compatible with the Treaty and particularly with the prohibitions on agreements and concentrations (Article 53);³ problems of investments and financial assistance (Articles 54–56. The letter of these provisions would suggest that the steps thereby authorized are more of an administrative than a legislative nature; none the less, the High Authority enacted law in this domain);⁴ intervention on prices and commercial policy (Article 57), including the establishment of a system of production quotas (Article 58(1)); problems of prices covered by Article 60;⁵ fixing of prices under Article 61—here there appears to be more room for executive than for regulative action;⁶ systematic discrimination practices (recommendations, Article 63(1)); imposing of obligations on governments under Article 63 (2);⁷ definition of what constitutes control of an enterprise (Article 66 (1));⁸ determination of conditions under which agreements among enterprises are permissible (Articles 65 (2) and 66 (2));⁹ elimination of abnormally low prices (Article 68 (2)); elimination of restrictions based

¹ *Journal officiel des C.E.* (1960), p. 1248. On the law-making powers of the Community, see in particular Lagrange, 'L'ordre juridique de la C.E.C.A. vu à travers la jurisprudence de sa Cour de Justice', *Revue de droit public et de la science politique, en France et à l'étranger*, 74 (1958), p. 841; Mathijssen, *Le Droit de la CECA* (The Hague, 1958); Kovar, *Le Pouvoir réglementaire de la CECA* (Paris, 1964). On the problem of the decision-making power of all three Communities, see Wagner, *Grundbegriffe des Beschlußrechts der europäischen Gemeinschaften* (Cologne, 1965); and Zellentin (ed.), *Formen der Willensbildung in den europäischen Organisationen* (Frankfurt, 1965).

² *Journal officiel des C.E.* (1952), p. 3, Decision No. 2/52. For the list of further decisions on the subject, see *Europäisches Recht. Textsammlung über nationalen und internationalen Rechts*, Part A II 71a, p. 6. See also *European Yearbook*, 9 (1961), p. 446.

³ Cf. Decision No. 2/57 of 26 January 1957, *Amtsblatt* (1957), p. 61.

⁴ See the principles promulgated *ibid.* (1954), p. 457, and 'guide', p. 460. See also Decision No. 27/55 of 20 July 1955, *ibid.*, (1955), p. 872. For the list of further acts on the subject, see *Europäisches Recht*, Part A II 31e. Decisions on the allocation of the resources of the Community under Article 59, § 3, are not, in our view, regulative in character.

⁵ Decisions Nos. 3/53 of 12 February 1953; 30/53 of 2 May 1953; and 1/54 of 7 January 1954; *Amtsblatt* (1953), pp. 21 and 109, and *ibid.* (1954), p. 217. Cf. n. 7 on this page.

⁶ See Decision No. 6/53, *Amtsblatt* (1953), p. 63. For the list of other decisions, see *Europäisches Recht*, Part A II 31b. Cf. also the revised Decision No. 31/53 of 2 May 1953, *Amtsblatt* (1957), p. 495.

⁷ Decision No. 4/53 of 12 February 1953, *ibid.* (1953), p. 21. See also Decisions cited above, n. 5 on this page.

⁸ Decision No. 24/54 of 6 May 1954, *Amtsblatt* (1954), p. 345.

⁹ Cf. *ibid.* (1953), p. 153.

on nationality against the employment of certain categories of workers (Article 69 (5)); recommendations on import and export licensing under Article 73; and trade policies covered by Article 74.

Finally, the High Authority was given a general legislative competence by Article 95, first subparagraph:

'In all cases not expressly provided for in the present Treaty in which a decision or a recommendation of the High Authority appears necessary to fulfil, in the operation of the common market for coal and steel and in accordance with the provisions of Article 5 above, one of the purposes of the Community as defined in Articles 2, 3 and 4, such decision or such recommendation may be taken subject to the unanimous concurrence of the Council and after consultation with the Consultative Committee.'

*The European Economic Community*¹

The main form of law-making is regulations (*règlements*, *Verordnungen*); but law is also enacted by way of decisions and, in part, by directives.² Regulations³ have 'a general application' and are 'binding in every respect'. They are directly applicable in each member State. The latter characteristic has made some commentators regard regulations as a parallel to domestic statutes⁴ and as the example of 'true European authority'.⁵ But the enforcement (including forced execution) of the regulations in the member States depends on action by domestic organs, for the Community lacks any apparatus of its own for that purpose.⁶ Directives, like recommendations of the High Authority in the Coal and Steel Community, are binding as to the result to be achieved; 'form and means' are left at the discretion of the domestic agencies. Finally, in the light of the Treaty, decisions appear as individualized acts and therefore of no interest to the law-making process. In practice, however, both the Council and the Commission have had recourse to this form in order to enact some of their law (Article 189).⁷ Regulations enter into force on the date which they indicate or, failing this, on the twentieth day following their publication. Directives and decisions take effect upon notification to their addressees (Article 191).

The principal legislative organ of the Community is the Council, which is composed of representatives of the member States (Article 146). Except

¹ For text, see above, p. 207, n. 1. The reservation made in n. 2 at p. 233 above applies equally here.

² Pescatore, 'Les aspects fonctionnels de la Communauté Économique Européenne, notamment les sources du droit', *Les Aspects juridiques du Marché Commun* (Liège, 1958), pp. 64-73.

³ Rabe, *Das Verordnungsrecht der Europäischen Wirtschaftsgemeinschaft* (Hamburg, 1963).

⁴ E.g. Wohlfahrt, loc. cit. above, p. 202, n. 5, at p. 24.

⁵ Cf. the commentary of the Commission of Foreign Affairs of the French National Assembly, Print No. 5266, at p. 168, cited by Wohlfahrt, loc. cit., n. 32.

⁶ Article 192.

⁷ Cf. *Amtsblatt* (1958), pp. 688 and 694; *Journal officiel des C.E.* (1960), pp. 1537 and 1873.

where the Treaty provides otherwise, resolutions of the Council are made by a majority vote. The Treaty distinguishes between ordinary or regular majorities and qualified majorities. For the purposes of the latter the votes are weighted: Germany, France and Italy have four votes each, Belgium and the Netherlands two votes each, and Luxembourg one vote. A qualified majority consists of twelve votes, and in cases where the Council reaches its conclusions without a previous proposal of the Commission, it must include a favourable vote by at least four member States (Article 148.)

The Council makes law by majority vote on numerous subjects: prohibition of discrimination on the ground of nationality (Article 7, qualified majority); reductions of customs duties due to be made during the third stage (Article 14, paragraph 2 (c), directives, qualified majority); special problems raised by the application of the Treaty provisions on the reduction of duties and their timing (Article 14, paragraph 5, directives, qualified majority); fixing of duties under the common customs tariff beginning with the third stage and barring agreement of Members (Article 20, qualified majority); technical difficulties arising in connection with the establishment of the common customs tariff (Article 21, paragraph 1, directives, qualified majority); adjustments required with a view to ensuring the internal harmony of the common customs tariff (Article 21, paragraph 2, qualified majority); modification or suspension of duties of the common customs tariff after the expiry of the transitional period (Article 28, qualified majority); common agricultural policy after the termination of the first two stages of the transitional period (Article 43, paragraph 2 (3), qualified majority); determination of objective criteria for the establishment of minimum price systems in agriculture and for the fixing of such prices (Article 44, paragraph 3; decisions under paragraph 4 (3) require a qualified majority; a special majority of nine votes is required for decisions made under paragraph 6); measures necessary to effect progressively the free movement of workers (Article 49);¹ abolition of restrictions existing within the Community on freedom of establishment, including implementation of the general programme laid down in this field (Article 54, paragraph 2, directives);² exclusion of certain activities from the application of Articles 48–58 (Article 55, qualified majority); coordination of administrative provisions which lay down special treatment for foreign nationals and which are justified by reasons of public order, public safety and public health (after the termination of the first two stages, Article 56, paragraph 2, qualified majority, directives); mutual recognition of diplomas, certificates and other qualifications (Article 57,

¹ Regulations No. 15, *European Yearbook*, 9 (1961), p. 510.

² Cf. *Programme général* in this field adopted by the Council on 18 December 1961, *ibid.*, p. 529.

paragraph 1, directives); transport problems covered by Article 75 after the termination of the first two stages (qualified majority); implementation of the principle abolishing any discrimination which consists in the application by a carrier, in respect of the same goods conveyed in the same circumstances, of transport rates and conditions which differ on the ground of the country of origin or destination of the goods carried (Article 79, paragraph 3, qualified majority); application of the principles on competition among enterprises laid down in Articles 85 and 86 (Article 87, paragraph 1 (2), qualified majority);¹ application of the Treaty provisions on aids granted by States (Article 94, qualified majority); elimination of distortions of competition resulting from disparities between the several domestic provisions, and if no agreement could have been reached on the subject among Members (Article 101, qualified majority, directives); implementation of the Council's own unanimous resolutions on the policy relating to economic trends (Article 103, paragraph 3, qualified majority, directives); harmonization of measures taken by individual Members to aid exports to third countries (after the second stage, Article 112, paragraph 1, qualified majority, directives); implementation of provisions on the European Social Fund (Article 127, qualified majority); and implementation of a common policy of occupational training (Article 128).

Against this impressive background of the legislative powers of the Council, the regulative competence of the Commission seems both limited and relegated to matters of secondary importance. The Treaty of 8 April 1965, it may be added, provides for the establishment of one Commission for all three Communities, the new Commission taking the place of the E.C.S.C. High Authority, the E.E.C. Commission and the Euratom Commission. The structure of the Commission is similar to that of the High Authority in the Coal and Steel Community. It is composed of nine members who are appointed by the Governments of member States acting in mutual agreement. Their term of office is four years and it is renewable. The members of the Commission 'perform their duties in the general interest of the Community with complete independence'; they neither seek nor accept instructions from any Government or other body (Articles 157 and 158). The Commission adopts its resolutions by majority and is empowered by the Treaty to legislate on certain administrative matters relating to the establishment of the customs union (Article 10, paragraph 2);² on the timing of the abolition of charges that have an effect

¹ Regulations No. 17, *Journal officiel des C.E.* (1962), p. 204. Campbell, 'Regulations as to the Implementation of Articles 85 and 86 of the Rome Treaty', *International and Comparative Law Quarterly*, 11 (1962), pp. 1027 et seq. For bibliography, see Schlochauer, 'Das Verhältnis des Rechts der Europäischen Wirtschaftsgemeinschaft zu den nationalen Rechtsordnungen der Mitgliedstaaten', *Archiv des Völkerrechts*, 11 (1963-4), pp. 30-4, in particular note 139 at p. 33.

² Cf. implementing provisions relating to the free movement of goods, *Journal Officiel des C.E.* (1958), pp. 688 and 694.

equivalent to customs duties on importation (Article 13, paragraph 2, directives), and on the application of Article 91, paragraph 2, relating to dumping practices.¹ The Commission also enacts 'implementing regulations' (*règlements d'application*), under the general authorization clause of Article 155, paragraph 1, in conjunction with specific authorizations contained in the Council's enactments, e.g. the Commission's Regulations No. 27 of 1962, which were made in application of the Council's Regulations No. 17 on competition. The Commission is the governing body of the Community and more often its decisions relate to the field of administration rather than legislation (e.g. Article 22, Article 25, paragraph 2, Article 30 et seq., Article 37, paragraph 3, etc.). The Commission also prepares the regulative acts of the Council, and the Treaty frequently makes the legislative action of the latter dependent on the proposal of the former.

*The European Atomic Energy Community*²

As already indicated, this Community has been granted only limited legislative powers. They are mainly concentrated in the hands of the Council, a body composed of representatives of member States (Article 117). As in the Economic Community, the Council adopts its resolutions by a majority vote unless the Treaty requires unanimity. The provisions on qualified majority are identical with those of the Economic Community (Article 118). The Council and the Commission of the Atomic Energy Community make law in the form of regulations, and also of decisions and directives. They have the same nature and features as the regulations, decisions and directives of the Economic Community (Article 161).

The subjects on which the Council has been empowered to make law are: security gradings and measures in connection with classified information (Article 24, paragraph 1);³ basic standards for protection against dangers arising from ionizing radiation (Article 31, 1st subparagraph, qualified majority);⁴ criteria of type or scope relating to new facilities, replacements or conversions in certain investment projects (Article 41, 2nd subparagraph);⁵ the duties of the common customs tariff if no agreement has been reached thereon between member States (Article 94 (b), qualified majority); application of the principle that there shall be abolished all restrictions based on nationality which have been placed upon access by nationals of any of the Members to specialized employment in the nuclear field (Article 96, second subparagraph, qualified majority, directives);⁶ and

¹ Regulations No. 8, *Amtsblatt* (1960), p. 597.

² For text, see above, p. 208, n. 3. The reservation made in n. 2 at p. 233 above applies equally here.

³ Regulations No. 3, *Amtsblatt* (1958), p. 406.

⁴ *Ibid.* (1959), p. 221; *European Yearbook*, 10 (1962-II), p. 900.

⁵ *Amtsblatt* (1958), p. 417.

⁶ Directive of 5 March 1962, *European Yearbook*, 10 (1962-II), p. 917.

measures facilitating the conclusion of insurance contracts covering atomic risks (Article 98, second subparagraph, qualified majority directives).

The Commission is composed of five members appointed by the Governments of the member States (nine members are provided for in the Commission under the Treaty of 1965). Their term of office is four years, and it is renewable. The supranational character, the status, and the voting system of the Commission are identical with those of the Commission of the Economic Community (Articles 126, 127 and 132). The Commission makes law on the procedure whereby it may be used as an intermediary to exchange the results of research (Article 15). In case of urgency the Commission issues directives on measures necessary to prevent the basic standards of radioactivity from being exceeded (Article 38, second subparagraph). In the field of safety controls the Commission has enacted regulations implementing Article 78¹ and, with the approval of the Council, regulations defining the nature and scope of obligations set forth in Article 79, 1st subparagraph, of the Treaty.² The Commission also makes regulations for the application of some of the law enacted by the Council.³

The above review of the regulative powers of the European Communities makes it possible to indicate a number of analogies and differences in the approach to the legislative process in the Treaties constituting the Communities.

The similarities are strong between the two Communities set up under the Rome Treaties of 1957, the categories of regulative acts being identical in the Economic Communities and the Atomic Energy Community (regulations, decisions and directives). The system of voting is also the same. Again, in both Communities it is the Councils—organs composed of Governmental delegates—which mainly exercise the legislative function, while the supranational Commissions play a secondary role. In all three Communities there exists an intermediate category of regulative act—the recommendation in the Coal and Steel Community and the directive in the other two Communities—where the objectives specified or the results to be achieved are mandatory, while the rest of the act is non-binding and, consequently, does not belong to the realm of legislation.

The divergences emerge from a comparison of the Coal and Steel Community with the Communities established under the Rome Treaties. Two basic questions have been solved in the Coal and Steel Community in a manner different from that in the other two Communities: (1) the choice of the organ principally responsible for the fulfilment of the legislative function; and (2) the scope of the legislative function.

¹ Regulations No. 7, *Amtsblatt* (1959), p. 298.

² Regulations No. 8, *ibid.*, p. 651.

³ *Ibid.*, 1958, p. 511.

Before the differences between the Communities with regard to these questions are explained, it may be desirable to mention the Treaty of 8 April 1965, which provides for the establishment of one Council of the European Communities (instead of each of the three Communities having a separate Council) and one Commission of the European Communities. The latter organ is a substitute for the High Authority of the European Coal and Steel Community, the Commission of the European Economic Community and the Commission of Euratom (Articles 1 and 9). At the moment of writing, the Treaty of 1965 has not yet entered into force. The matter is of secondary importance to the present Section because the Treaty of 1965 does not purport to modify the legislative power of the Communities as described above under the régime of separate Councils and separate executive organs.

In the Coal and Steel Community most of the legislation has been concentrated in the hands of the supranational High Authority. Here law is made for States, enterprises and individuals by a body which is primarily concerned with the general interest of the Community and whose members neither receive any instructions from, nor act in favour of, particular Governments or organizations. In the other Communities regulative powers have been bestowed on the respective Councils, i.e. organs which, in line with the traditional principles of international organization, are composed of governmental representatives and thus have a diplomatic character. The interesting point is that the same group of States (the membership is identical in all three organizations) adopted one solution in the Community set up in 1951 and another in the Communities created six years later.

There is no justification for the contention that the pattern adopted in the Coal and Steel Community proved unsuccessful and that in the new Communities States had to turn to a different mechanism of legislation. It is true that on occasions the legality or propriety of the legislative acts of the Coal and Steel Community were questioned by a party before the Court of that Community. But this also began to occur with respect to the acts of the Economic Community. The raising of the matter in the Court proceedings does not therefore justify the assumption that the High Authority abused or wrongly exercised its regulatory powers and that a different approach had to be adopted to the problem of legislation in the new Communities. It is elsewhere that the cause of the change is to be found.

The Rome Treaties were preceded by the failure of the European Defence Community. From 1954 onwards there was a definite slowing down of the integration process among the six countries, and in the new moves favouring integration less emphasis had for the time being to be put on

supranationalism.¹ After the setback of 1954 the road on which the authors of the Rome Treaties embarked had to run between two extreme solutions: conferring wide legislative powers exercised by a supranational organ, or limiting the competence of the new Communities to the making of recommendations and to the functions of co-ordination.²

It may be added that the different regulation of problems of legislation in the Rome Treaties was also dictated by reasons that were independent of the integration crisis in the middle fifties. This leads us to the differences in scope which characterize the legislation of the respective Communities. In the Coal and Steel Community the basic law was formulated in the Treaty of 1951, and the enactments of the Community, in particular those of the High Authority, implement and develop what has already been agreed upon by the member States. *Ratione materiae* the law made by the Coal and Steel Community amounts to a detailed application of the several substantive provisions of the Treaty. The picture changes when the Economic Community is considered. In the Rome Treaty one finds the basic law in the customs union, in the free movement of persons, services and capital, and partly in the problems of transport. This, no doubt, is a vast area but it does not cover all the subjects which require unified regulation before the member States can be regarded as forming a true economic community. *Ratione materiae* the activities of the organization encompass not one section, however important, of production and trade, but the whole economic life of the member countries. Hence the regulative powers of the Economic Community are wider and go deeper into the domestic sphere of the participating States than those of the Coal and Steel Community;³ in comparison with administration (executive action) or co-ordination, the function of legislation appears as the principal activity of the Economic Community.⁴ The Community has before it the task of creating a significant part of the body of law which guarantees its existence, its development and the attainment of its aims. The rules of that law were only partially embodied in the Rome Treaty of 1957. Such an important legislative task implied a number of political decisions, which, even were there no difficulties on the road to European integration, required Government negotiations and consensus. An organ independent of Governments could not be entrusted, at the then stage of development of international organization, with the building of a union which today remains the closest

¹ Cf. Efron and Nanes, 'The Common Market and Euratom Treaties: Supranationality and the Integration of Europe', *International and Comparative Law Quarterly*, 6 (1957), p. 674, and Wohlfahrt, loc. cit. above, p. 202, n. 5, at p. 23.

² Wohlfahrt, *ibid.*

³ *Ibid.*, p. 24.

⁴ *Ibid.*, p. 13. Detter, *op. cit.*, pp. 263-5, briefly discusses some of the reasons for the differences in the distribution of legislative powers in the European Communities.

association of sovereign States and presupposes even tighter links in the future between its participants.

8. LEGAL NATURE OF ACTS ADOPTED BY MAJORITY. ENACTMENTS OF INTERNATIONAL ORGANIZATIONS AS SOURCE OF LAW

To say that enactments passed by a majority vote and binding on the dissenting minority are not contractual instruments is to state the obvious. For it remains the essence of a treaty that it imposes duties on, or gives rights to, only those who consent to it.¹ None the less, some writers have expressed the view that internal regulations, in particular rules of procedure, are treaties. Thus Anzilotti regarded them as a 'special form of agreement' made through the instrumentality of the organ which adopted the regulations. For him the rules in question remained 'treaty norms' and their 'formal value' was not different from the provisions contained in the original treaty.¹ In the opinion of a contemporary authority rules of procedure 'may properly be considered as a part of international law of the same general legal character as treaty law . . .'.² According to another learned writer, the Rules of the International Court of Justice 'must be regarded as forming part of conventional law';³ and he cites the principle regarding the consent of parties to the Rules as formulated by the Permanent Court of International Justice in the advisory opinion concerning *Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*.⁴ It is also appropriate to note here the opinion which broadens the notion of international agreement in order to accommodate regulative acts of international organizations. Their regulatory powers are said to have brought about a change in 'the concept of international agreement as a source of law', which is now claimed to include not only the terms of agreements delegating certain regulatory powers to international bodies but also 'the outcome of regulatory . . . powers conferred thereby'.⁵ The latter view, it may be observed, concerns all types of enactments made by international organizations and not merely their internal law.

The problem whether enactments of inter-governmental bodies are treaties has already been discussed in Section 5, above, with respect to

¹ Anzilotti, *op. cit.*, p. 295.

² Jessup, *op. cit.*, p. 204. But he adds: 'and therefore legally binding upon the States members of the organization.' It is not clear whether Professor (now Judge) Jessup limits the identity between rules of procedure and treaties to the binding force of the former or whether, in his view, the 'legal character' of the rules of procedure is, as was Anzilotti's opinion, the same as that of treaties.

³ Rosenne, *The International Court of Justice. An Essay in Political and Legal Theory* (Leyden, 1957), p. 213.

⁴ *P.C.I.J.*, Ser. B, No. 12, at p. 31.

⁵ Jenks, *The Proper Law of International Organisations* (London, 1962), p. 258-9.

unanimous acts and the system of contracting out. It is submitted that the arguments there adduced in defence of the view that those two types of law-making do not fall under the head of treaty are relevant also in relation to majority acts. For the authorship of these acts must even more definitely be attributed to the organization as a corporate person distinct from the member States. The law of treaties finds application to majority acts even less than to unanimous acts or to acts adopted under the guarantees of contracting out. In their practice States do not regard internal regulations of international bodies or law made by the European Communities as treaties. The fact that States which in the legislating organ voted against the enactment may in these cases become bound against the clear expression of their intention excludes any concept of contractual obligation or of a binding force based on consent. This conclusion becomes even clearer when the distinction is drawn between, on the one hand, the instrument which authorizes the organization to make law and, on the other, the instrument which is the outcome of the exercise by the organization of its law-making power.

The treaty is one source of law and the regulative act of the international organization is another, though the making of the latter is based on the former. Delegated or subordinate legislation results in rules of law which are different from the original enactment. In the municipal sphere a statute or act adopted by the legislature is based on, and must conform to, the constitution of the country, but it is neither identical with, nor has the rank of, the constitution itself.¹ Similarly, if a ministry or department or any other branch of the executive enacts law by virtue of the authorization contained in the statute or act made by the legislature, this law belongs to a different category of rules and derives from a source other than the law enacted by the legislature. The two sources of law remain different and separate though one may depend on the other.² It has been rightly observed by Judges Spender and Fitzmaurice that 'the fact that an act is done under an authority contained in an instrument which is itself a treaty . . . does not *per se* give the resulting act a treaty character'.³

¹ Cf. Tammes, loc. cit., pp. 269-70. See also Schultz, op. cit., p. 116, on the analogy drawn from federal legislation.

² Reuter, op. cit. above, p. 226, n. 2, at pp. 452-3: 'deux questions qu'il faut séparer: celle de la distinction des sources formelles et celle de leur dépendance. Il est normal d'admettre que les sources formelles puissent dériver l'une de l'autre; [. . .] il n'y a donc aucun inconvénient à reconnaître que la force obligatoire de la législation internationale découle de traités; mais cette législation constitue une source distincte, car elle se manifeste selon des procédés qui sont différents des actes conventionnels.' Bastid, op. cit., p. 37: 'C'est le traité qui est le point de départ de la compétence réglementaire des organes délibérants. Mais, ceci posé, se développe un système de droit qui est original à la fois dans sa technique d'élaboration et dans son contenu.'

³ Joint Dissenting Opinion in the *South-West Africa cases (Preliminary Objections)*, I.C.J. Reports, 1962, p. 465, at p. 491. Cf. also p. 475 where the view is taken that the notion of treaty is 'not an unlimited one', and p. 476, that it is a fallacy to identify 'the idea of an international

More often than not rules enacted by an organization do not simply particularize the principles and provisions of the constituent treaty, but set up standards of behaviour which are substantially new. True, they serve the aims of the organization and conform to the tasks of the legislating organ. But in its substance much of the internal law of international organizations, including the rules of procedure which are its least controversial part, is new law as compared with the constitution of the organization. As to the enactments addressed directly to States, it is often vain to look in the constituent treaties for any specific guidance as to the content of the law made by the organization. For example, the Chicago Convention hardly specifies the technical standards for air navigation; the W.H.O. Constitution is silent on quarantine principles and procedures; and the Rome Treaty establishing the European Economic Community does not spell out a complete set of basic rules for the economic union of the member States. Law made on the basis of these and other treaties imposes duties on States and/or gives them rights which are not repetitive of what the States have already agreed upon in their contractual instrument.¹

Article 38 of the Statute of the International Court of Justice, admittedly, does not mention regulative acts of international organizations;² and in the *Lotus* case the Permanent Court of International Justice observed that the 'rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . .'.³ In the judgment of the International Military Tribunal for the Trial of German Major War Criminals there is a dictum, made in connection with the General Treaty for the Renunciation of War (the Kellogg Pact), that 'international law is not the product of an international legislature . . .'.⁴ However, the Court's Statute was drafted and the two judgments referred to were rendered at a time still influenced by the dichotomy of custom and treaty. Even now there is no general international legislature, and as long as sovereign States do not enter into a closer union, international law will remain a system of rules which in their bulk originate in the direct consent of States. Nevertheless, the modern phenomenon of international law made through procedures similar to the techniques long since developed in the municipal sphere must not be allowed to pass unnoticed. Franz von Liszt's categorical statement that international law is agreement, not law (*Völkerrecht ist Vertrag nicht Gesetz*)⁵

agreement with any act or instrument embodying, or giving rise to, international obligations, or which contains or involves an international "engagement"''.

¹ For a somewhat contrary view, see Ago, *op. cit.*, p. 25.

² Tamme, *op. cit.*, p. 268. For an explanation, see Parry, *op. cit.* above, p. 199, n. 7, at p. 110.

³ *P.C.I.J.*, 1927, Series A, No. 10, at p. 18.

⁴ Cmd. 6964, at p. 40.

⁵ Von Liszt, *Das Völkerrecht* (12th ed., Berlin, 1925), p. 9. Cf. Schultz, *op. cit.*, p. 72: 'Im Augenblick der Majorisierung vollzieht sich der Übergang vom Vertrag zum Gesetz. Die satzungsmäßige Einführung des Majoritätsbeschlusses ist ein Anzeichen der rechtlichen Ver-

is now ripe for cautious revision. The silence of Article 38 has not prevented the International Court from applying the internal law of some international organizations. In its advisory opinion on the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* the Court applied the Statute of the Tribunal, i.e. law made by the General Assembly of the United Nations.¹ In its advisory opinion relating to the *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against U.N.E.S.C.O.*, the Court once again applied internal law, namely the Statute of the I.L.O. Tribunal and the Staff Regulations.² Finally, in its advisory opinion on *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, the Court invoked and applied the Financial Regulations and Rules of the United Nations.³ It is true that The Hague Court has not so far had any opportunity to apply law enacted by an international organization for the member States as distinct from internal law. On the other hand, another international tribunal, the Court of Justice formerly of the European Coal and Steel Community and now of all three Communities, frequently applies the legislative acts of the parent organizations made for States.

The conclusion, then, is that law-making acts of international organizations are a distinct source of the law of nations. This view gains support, in varying degree, among writers,⁴ though contrary opinions are not absent.⁵

Law made by international organizations is part of public international law, and enactments made by virtue of a majority vote are no exception. The doctrine which regards the internal law of international organizations

festigung und Verselbstständigung des internationalen Gemeinschaftsorgans und leitet damit zu einer verfassungsmäßigen, gesetzartigen Bindung über.'

¹ *I.C.J. Reports*, 1954, p. 47, at pp. 51 et seq.

² *Ibid.*, 1956, p. 77, at pp. 80 et seq. and 92 et seq. ³ *Ibid.*, 1962, p. 151, at pp. 168-9.

⁴ Fauchille, *Traité de droit international public* (Bonfils ed., Paris, 1922), vol. 1, Part 1, pp. 41, 42 and 48; Levin, 'K voprosu o poniatii i sisteme sovremennogo mezhdunarodnogo prava,' *Sovetskoe gosudarstvo i pravo* (1947), No. 5, at pp. 12-13; Krylov, 'Les notions principales de droit des gens', *Recueil des cours*, 70 (1947-I), at p. 443; Krylov, loc. cit. above, p. 228, n. 7, at pp. 74-9; Bierzanek, 'Metody rozwoju i formułowania prawa międzynarodowego a O.N.Z.' (Methods of Development and Formulation of International Law and the U.N.), *Państwo i Prawo*, 3 (1948), No. 2, p. 9; Fenwick, *International Law* (3rd ed., New York, 1952), p. 79; Kelsen, op. cit. above, p. 199, n. 5; Kelsen, 'Théorie du droit international public', *Recueil des cours*, 84 (1953-II), pp. 169-70; Lisovski, *Mezhdunarodnoe pravo* (Kiev, 1955), p. 28; Verdross, *Völkerrecht* (Vienna, 1955), p. 129; Korovin in the collective work *Mezhdunarodnoe pravo* (Kozhevnikov ed., Moscow, 1957), p. 9; Reuter, *Droit international public* (Paris, 1958), pp. 90-1; Tammes, loc. cit., pp. 269-70; Schultz, op. cit., p. 117; Sørensen, loc. cit., pp. 91 et seq.; Jaenicke, 'Völkerrechtsquellen', *Strupp-Schlochauer Wörterbuch* (Berlin, 1962), vol. 3, p. 772; Detter, op. cit., p. 329; Wengler, op. cit., pp. 319-33; Brownlie, *Principles of Public International Law* (1966), p. 536. For a discussion of Soviet views, see Lukin, op. cit., pp. 107 et seq. and Tunkin, op. cit., pp. 122 et seq., and cf. their own views at pp. 123 and 136 respectively. See also Lukashuk, *Istochniki mezhdunarodnogo prava* (Kiev, 1966), pp. 81-94, and *Kurs mezhdunarodnogo prava* (Moscow, 1967), vol. 1, pp. 187-95.

⁵ Above, p. 220, nn. 2, 3, p. 223, n. 1, p. 224, n. 1, and *Mezhdunarodnoe pravo* (Korovin ed., Moscow, 1951), pp. 15-19; Sibert, op. cit., p. 36; Dahm, op. cit., p. 25. Cf. also Bierzanek's admission that theoretically it is possible to treat regulative acts as treaties, loc. cit.

as a branch of law distinct both from international and municipal law¹ is not convincing. One must rather subscribe to the view that 'if a body has the character of an international body corporate the law governing its corporate life must necessarily be international in character . . .'.² Perhaps less clear is the case of the law other than internal made by the European Communities. That law is usually referred to as European or community law (*droit communautaire*, *Gemeinschaftsrecht*), thus emphasizing an apparent distinctness from international law. According to a recent definition the community law is an 'autonomous juridical order which results from the set of rules established by the Treaties for the purpose of implementing, through specific measures that are provided for, the tasks therein defined'.³ The reference is to the Treaties under which the European Communities function: 'In so far as the 'sources' of that community law are concerned, as they follow from the Treaties, the implementing regulations and judicial decisions, they place themselves essentially within the general principles of law of the member States, occasionally even in the positive rules of that law, and subsidiarily in international law.'⁴ Whatever criticisms can be levelled against its language, the definition clearly points to the complex nature of the law of the European Communities, and does not deny that international law is an element in the community law. Another recent writer also regards the Treaties of 1951 and 1957, together with the supplementing agreements, as part and parcel of the community law.⁵ At the same time an attempt is made to classify further the community law. Hence the concept of the so-called secondary community law (*sekundäres Gemeinschaftsrecht*), i.e. law made by the Communities through their regulative acts.⁶ Evidently only this part of the community law is of interest to the present paper.

The 'secondary law' is in its substance, addressees, and pattern of enactment⁷ so much closer to municipal law than to a great number of rules of public international law that one may be tempted to regard it as a separate branch of law that should be distinguished from the law of nations.⁸ However, it is submitted that law made by the European Com-

¹ Focsaneanu, loc. cit. Cf. also Lukin, op. cit., p. 117. The different opinions on the character of the internal law are reviewed in the Introduction to Kolasa, *Rules of Procedure of the United Nations General Assembly. A Legal Analysis* (Wrocław, 1965). And see Wengler, op. cit., pp. 334-9.

² Jenks, op. cit. above, p. 242, n. 5, at p. 3. Cf. also the observations by Mann, 'The Proper Law of Contracts Concluded by International Persons', this *Year Book*, 35 (1959), p. 52.

³ Lagrange, 'La primauté du droit communautaire sur le droit national', *Semaine de Bruges* 1965; *Droit communautaire et droit national*, p. 23.

⁴ Ibid.

⁵ Bülow, 'Das Verhältnis des Rechts der europäischen Gemeinschaften zum nationalen Recht,' *Aktuelle Fragen des europäischen Gemeinschaftsrechts* (Stuttgart, 1965), p. 30.

⁶ Ibid., pp. 33-4.

⁷ Cf. *ibid.*, p. 36.

⁸ That view is widely held. See, for instance, Wohlfahrt, loc. cit., p. 28 and Jaenicke, op. cit., p. 773. See also Schultz, op. cit., pp. 11-12 and Schlochauer, 'Das Verhältnis des Rechts der

munities remains part of international law. In the framework of the latter, the former is a particular law. Today international law becomes more and more complex; its rules derive from new sources and regulate relations that some thirty years ago were unknown to the traditional domain of the law of nations. While many regulative acts of the European Communities find application to subjects other than the member States, it cannot be said that such acts do not simultaneously concern the public rights and/or duties of States. In the law of the Communities it is not possible to draw a strict and clear line between provisions that define the rights and duties of States and provisions that govern the position of other persons.¹ The particular nature of the community law within the broader framework of international law mainly derives from the character of the European Communities as international organizations of a special type. They are supranational organizations, but they do not cease to be international organizations. The presence of the supranational elements in the Communities may justify the statement, whatever it may mean, that the Communities display 'prefederal features'.² However, it is beyond doubt that none of the Communities is at present a federal State nor its law a municipal-like system of rules. In view of the supranationality of the Communities the relations between them and the member States differ from the pattern of traditional international relations.³ Nevertheless, as international law and organization are developing there is room for new phenomena of the type of the European Communities, and it is neither necessary nor does it

Europäischen Wirtschaftsgemeinschaft zu den nationalen Rechtsordnungen der Mitgliedstaaten,' *Archiv des Völkerrechts*, 11 (1963-4), pp. 3-7, who refer to the community law as supranational law. For further writings, see Schlochauer, *passim*. Cf., on the other hand, Scheuner, *op. cit.*, p. 235. For a recent discussion of the problem, see Mosler, 'European Law: Does it Exist?', *Current Legal Problems* (1966).

¹ Bülow, *op. cit.*, p. 30, who cites the decision of the Court of European Communities in Case No. 26/62 (the *Tariefcommis* case), *Sammlung der Rechtsprechung des Gerichtshofes der Europäischen Gemeinschaften*, 9 (1963), p. 7.

² 'Präföderale Züge', Bülow, *op. cit.*, p. 42. In Case No. 8/55 the Advocate-General contended that the European Coal and Steel community is based 'sur un type qui s'apparente beaucoup plus à une organisation fédérale qu'à une organisation internationale', *Recueil de la jurisprudence de C.J.C.E.* 2 (1955-6), p. 263.

³ Cf. Bülow, *op. cit.*, p. 44. In Case No. 26/62 referred to above in n. 1 on this page, the Court of the Communities described the European Economic Community as 'un nouvel ordre juridique de droit international' (italics supplied): see p. 23 of the French version of the Court's Reports. In Case No. 6/64 the Court spoke, however, of 'un ordre juridique propre intégré au système juridique des États membres', *Recueil de la jurisprudence de C.J.C.E.* 10 (1964), p. 1159. Cf. Cahier, *Le Droit interne des communautés européennes à la lumière de la jurisprudence de la Cour* (mimeo., University of Paris, Institut des Hautes Études Internationales (1964-5)), pp. 75-6. As to the question whether the law of each Community is 'un droit dérivé du droit international' or whether it constitutes 'un ordre juridique originaire', it is not contended here that the law of the Communities 'derives' from international law—whatever this figure of speech may mean. But neither should that law be contrasted with international law. Without denying its originality and autonomy, it is here held that the law of the Communities is not one of a composite State. It is made by international bodies to serve their manifold purposes and those of the individual members. The notion of international law becomes progressively broader and it may today encompass also the law of the Communities.

appear justified to invent new categories to define, *inter alia*, the place and character of law made by the Communities.

9. SOME DOUBTFUL CASES

There are some further resolutions adopted by international organizations where it is not clear whether the acts in question are inter-State agreements or regulative enactments of the organization made for the member States.

Thus the International Bank for Reconstruction and Development enacted regulations applicable to its loans. Loan Regulations No. 3 of 15 June 1956¹ apply to loans granted by the Bank directly to its members, while Loan Regulations No. 4 of the same date² are applicable to loans made by the Bank to borrowers other than member Governments. However, these Regulations are not by themselves law for States, and acquire that character only through a State's consent, which is expressed in a loan agreement or guarantee agreement. If the agreement so provides, and to the extent therein stipulated, the Regulations govern the rights and duties of the parties with the same force and effect as if they were fully set forth in the agreement.

The question of regulative powers also arises in connection with the activities of certain fisheries bodies. For example, the Agreement of 26 February 1948,³ approved by the Food and Agriculture Organization, established the Indo-Pacific Fisheries Council, one of whose functions is 'to propose, and where necessary to adopt, measures to bring about the standardization of scientific equipment, techniques and nomenclature' (Article III (f)). An identical provision is to be found in Article III (f) of the Agreement of 24 September 1949 setting up the General Fisheries Council for the Mediterranean.⁴ It is submitted that the exercise of the above competences may involve the making of regulative acts by the Councils. In that event the Councils would take their decisions by a simple majority (Article II, paragraph 2). The present writer is not, however, aware of any legislative activity of the Councils, or whether the provisions in question have been interpreted in practice as giving regulative powers to the respective organizations.

Another case to be considered is the International Commission for the North-West Atlantic Fisheries provided for in the Convention signed on 8 February 1949 in Washington.⁵ The maritime area to which the Convention applies is divided into sub-areas, and for each of them a Panel is

¹ *U.N. Treaty Series*, vol. 280, p. 302.

² *Ibid.*, vol. 260, p. 376.

³ *Ibid.*, vol. 120, p. 59; amendments *ibid.*, vol. 227, p. 322.

⁴ *Ibid.*, vol. 126, p. 238.

⁵ *United States Treaties and Other International Acts Series*, p. 2089.

established and maintained (Article 4). In order to keep the stocks of those species of fish which support international fisheries in the Convention area at a level permitting the maximum sustained catch, the Commission may, on the recommendation of one or more Panels, make proposals for the application of a number of measures. Article 8, paragraph 1, provides that these measures may consist in

- '(a) establishing open and closed seasons;
- (b) closing to fishing such portions of a sub-area as the Panel concerned finds to be a spawning area to be populated by small or immature fish;
- (c) establishing size limits for any species;
- (d) prescribing the fishing gear and appliances the use of which is prohibited;
- (e) prescribing an over-all catch limit for any species of fish.'

Paragraph 8 then adds that

'the proposal shall become effective for all Contracting Governments four months after the date on which notifications of acceptance shall have been received by the Depositary Government from all the Contracting Governments participating in the Panel or Panels for the sub-area or sub-areas to which the proposal applies.'

In the Panel it may happen that only some Contracting Governments are represented; others may choose not to participate in the work of the Panel. A rule made according to procedures prescribed in Article 8 becomes law not through a majority resolution of the Commission, which is not by itself binding on anybody, but through the subsequent acceptance of Governments participating in the Panel. Here a group of countries enacts law for all the contracting parties and the binding force of the regulation originates not in an act of the Commission but in the express approval of the States designated by Article 8, paragraph 8. While there may be certain analogies of a secondary nature, this procedure really constitutes a basic departure from the pattern governing the adoption of the technical annexes by the International Civil Aviation Organization. In that Organization international standards acquire binding force through the Organization's decision, and this binding force is only suspended for the period and under conditions specified in Article 90 of the Chicago Convention.

The question whether the organization makes law for States may arise in connection with the provision of Article 3, section A, paragraph 6, of the Statute of the International Atomic Energy Agency.¹ The Agency has been authorized to adopt, in consultation or collaboration with some other organizations, standards of safety for protection of health and minimization of danger to life and property, including standards for labour conditions. The regulations on such standards are the internal law of the Agency

¹ *U.N. Treaty Series*, vol. 276, p. 3. Willrich, 'The Development of International Law by the International Atomic Energy Agency', *Proceedings of the American Society of International Law* (1965), p. 153.

whenever they apply to the operations of the Agency or even 'to the operations making use of materials, services, equipment, facilities and information made available by the Agency or at its request or under its control or supervision'. The application of the standards to operations that lie in a different sphere, in particular to operations under bilateral or multilateral agreements or to domestic operations of a State in the field of atomic energy, depends on the 'request' of the country or countries concerned, i.e. on consent, and does not therefore result from legislation by the Agency.

Among the organizations whose regulative powers are subject to doubt mention should also be made of the Council for Mutual Economic Assistance. The Council is now composed of Albania, Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland, Roumania, and U.S.S.R. It was set up under an agreement reached in January 1949;¹ its Charter (Statute) was signed on 14 December 1959 at Sofia² and thereafter amended. It follows from the Charter that the Council has not been equipped with legislative powers other than for the making of its internal law; for Article IV, paragraph 2, provides:

'Decisions shall be adopted on organisational and procedural questions. Such decisions shall take effect, unless it is specified otherwise in them, from the date on which the record of the meeting of the Council organ concerned is signed.'

'Organisational and procedural' questions—this is a clear indication that in its legislative activities the Council cannot go beyond the sphere of the internal affairs of the organization. This interpretation finds support in paragraph 1 of the same Article, which deals with the adoption of recommendations:

'Recommendations shall be adopted on questions of economic and scientific-technical co-operation. Such recommendations shall be communicated to the member countries of the Council for consideration.

'Recommendations adopted by member countries of the Council shall be implemented by them through decisions of the Governments or competent authorities of those countries, in conformity with their laws.'

Thus in matters which have a primary bearing on the attainment of the purposes of the Council, the organization is empowered to formulate merely non-obligatory acts. These acts can acquire binding force only through the subsequent consent of individual Governments. The recommendations of the Council are recommendations *sensu stricto*, and not law-making acts called recommendations like those of the European Coal and Steel Community or the North-East Atlantic Fisheries Commission. Any

¹ The agreement was never published. The establishment of the Council was announced in the communiqué of the Soviet news agency TASS on 25 January 1949.

² *U.N. Treaty Series*, vol. 368, p. 253. The Charter has since been amended. This writer, "Le Conseil d'Entraide Économique et ses actes", *Annuaire français de droit international*, 12 (1966), pp. 544-76, and de Fiumel, "Le caractère juridique des résolutions des organes du Conseil d'Aide Économique Mutuelle", *Cahiers de droit européen* (1967), pp. 533-47.

resolution of the Council is adopted by a unanimous vote, though a member may declare itself uninterested in any particular question; then its abstention or absence does not invalidate the resolution which, however, is not as a result applicable to it (Article IV, paragraph 3). It follows that the Council does not differ from the majority of contemporary international organizations whose law-making powers are limited to the enactment of internal law. (In this respect the Council is even more traditional and conservative than most organizations: its internal law is made by virtue of *unanimous* decisions). No special reference to the Council would have been called for, were it not for certain of its activities that might make one wonder whether the regulative competence of the Council is really so limited as appears from the letter of its Charter.

On 13 December 1957 the Council's Commission for Foreign Trade adopted an instrument which bears the name of General Conditions of Delivery.¹ In 1962 the Commission adopted the General Conditions of Mounting and Other Technical Services² and the General Conditions of Technical Operations.³ From the point of view of the unification of the law on commerce among the Member States the General Conditions of Delivery play an important role. They deal in particular with the conclusion of the contract for delivery of goods, the rights and duties of buyer and seller ('basis of delivery'), place and time of delivery, quality and quantity of goods, packing, marking, technical documents, verification of the quality of goods, guarantees, shipping instructions and notifications of delivery, procedure for payment, circumstances relieving the parties from responsibility, claims arising from quantity or quality defects, fines, arbitration, and supplementary conditions. The view has been expressed that the General Conditions of Delivery constituted a decision,⁴ i.e. an act which took effect irrespective of the individual members. This view appears to assume that at least in subject-matters covered by the instrument under consideration the Council exercised a legislative competence. It is submitted that this opinion is erroneous. The General Conditions of Delivery were adopted before the Charter of the Council was signed and before it entered into force. The writer has no knowledge of any regulative competence of the Council prior to 14 December 1959. It is therefore impossible

¹ For an English translation, see text appended to Berman, 'Unification of Contract Clauses in Trade between Member-Countries of the Council for Mutual Economic Aid', *International and Comparative Law Quarterly*, 7 (1958), p. 665. The full title of the instrument is 'General Conditions of Delivery of Goods between Foreign-Trade Enterprises of Member-Countries of the Council for Mutual Economic Assistance'.

² *Dziennik Urzędowy Ministerstwa Handlu Zagranicznego* (Official Journal of the Polish Ministry of Foreign Trade, 1962), No. 15, Item 140.

³ *Ibid.*, No. 19, Item 170.

⁴ Jakubowski, 'Prawne ramy obrotu handlu zagranicznego między krajami socjalistycznymi' (Legal Framework of Foreign Trade between Socialist Countries), *Państwo i Prawo*, 16 (1961-II), p. 530.

to say whether the pre-Charter powers of the Council were broader or smaller than, or identical with, those now provided for in Article IV. Even if it were possible retroactively to apply that Article to the General Conditions of Delivery they could never be regarded as a decision because the latter category of act concerns only 'organisational and procedural questions'. The instrument under discussion is not the internal law of the Council, for it regulates substantive problems which arise in the trade relations and exchange of goods between the member countries. The General Conditions of Delivery became effective in each member State on 1 January 1958 by virtue of an ordinance enacted by the respective Minister for Foreign Trade. Again, it is difficult to say whether the Ministers provided for the entry into force of the General Conditions in the national jurisdictions because this act was already binding on their countries and had to be transformed into the law of the land or whether the act became law solely through the municipal action of the Ministers. The latter opinion is more in line with any reasonable assumption as to what were the pre-Charter powers of the Council; it would also accord with its present powers. It may be that the General Conditions of Delivery, if they have any international¹ binding force at all, are an international agreement concluded in simplified form. But an arbitral decision on the legal nature of a *bilateral* instrument on the delivery of goods in Polish-Czechoslovak trade denied that they were a treaty,² and the question may be asked whether a similar opinion would have been expressed with respect to the General Conditions of Delivery. On the other hand, the international nature of the acts of 1962 referred to above is less doubtful. They were adopted under the Charter of the Council, and in view of their subject-matter they must be classified as recommendations (Article IV, paragraph 3). They became effective in the member countries only by virtue of the subsequent domestic action.

Nor is it clear whether the Latin American Free Trade Association, established under the Montevideo Treaty of 18 February 1960, is equipped

¹ In contradistinction to effectiveness in municipal law which is beyond doubt, cf. the decision of 14 June 1957, of the Arbitral Court, Chamber of Foreign Trade, German Democratic Republic, which deals with the bilateral conditions of delivery. The decision is reported in *Handel Zagraniczny* (Warsaw, 1958), No. 6, p. 37. The findings of the Arbitral Court can be applied by way of analogy to the act of the Council. On the domestic effectiveness of the latter, see Lunc, *Mezhdunarodnoe chastnoe pravo. Obshchaia chast'* (Moscow, 1959), pp. 80-5; Trammer, *Krótki Komentarz do Ogólnych Warunków RWPG 1958* (A Short Commentary on the General Conditions of Delivery of the C.M.E.A. 1958, Warsaw, 1961), p. 7; Jakubowski, loc. cit., and generally, Jan Sandorski, 'Uchwały RWPG a prawo wewnętrzne PRL', *Nowe Prawo*, 23 (1967), pp. 1329-34 (Resolutions of the C.M.E.A. and the Municipal Law of Poland). The General Conditions of Delivery are the law for the businesses engaging in foreign trade, and probably also for some common (i.e. inter-State) enterprises such as Haldex and Spedrapid. On the latter problem, see Jakubowski, 'Próby unifikacji prawa w ramach RWPG' (Attempts at the Unification of Law in the C.M.E.A.), *Sprawy Międzynarodowe*, 18 (1965), No. 9, p. 42.

² Decision of 9 January 1958, College of Arbitrators, Polish Chamber of Foreign Trade, reported in *Handel Zagraniczny* (1958), No. 2, pp. 31-4.

with legislative powers with regard to the member States.¹ The Conference of the Association, where all the members are represented, is empowered to take 'the steps necessary for the implementation' of the Treaty. This very general competence could include the making of regulations (Article 34 (a)). During the first two years in which the Treaty was in force each member had the right to veto the decisions of the Conference. Thereafter the contracting parties were to determine the voting system applicable after the initial period (Article 38).

Finally, a word must be said about the somewhat peculiar case of the Danube Commission set up by the Convention Regarding the Régime of Navigation on the Danube signed at Belgrade on 18 August 1948.² Under Article 8, paragraph (f), the Commission is competent

'... to establish a uniform system of traffic regulations on the whole navigable portion of the Danube and also to lay down the basic provisions governing navigation on the Danube, including those governing the pilot service ...'

Under paragraph (g) of the same Article the Commission unifies 'the regulations governing river inspection'; on the other hand, the language used with respect to customs and sanitary regulations is slightly different, as the Commission is empowered 'to promote the unification' of such regulations (Article 26, paragraph 2). In any case, the terms of Article 8 (f) and (g) seem to provide a sufficient basis for the exercise of legislative functions by the Commission. The voting here is by a majority of all members of the Commission (Article 12).

At its IVth Session the Commission adopted the *Dispositions fondamentales relatives à la navigation sur le Danube*, and it revised them at the XIth and XXth Sessions. It also established the *Règles de la surveillance fluviale applicables au Danube* (Vth Session) and took a *Décision concernant l'établissement d'un système uniforme de l'aménagement des voies navigables sur le Danube* (VIIth Session).

However, all these acts contain a clause which deprives them, as acts of the Commission, of binding force. This clause stipulates that the Commission does not adopt the act in question as obligatory for the members but simply recommends that members make the act effective (*mettre en vigueur*). Hence the binding effect of the Commission's regulations originates in the consent by members and not in the organ's decision. This restrictive interpretation of the Commission's powers seems even more astonishing as

¹ G.A.T.T., Doc. L/1157/Rev. 1; 87th Congress of the United States, 2nd Sess., Subcommittee on Inter-American Economic Relationships of the Joint Economic Committee, *Economic Policies and Programs in South America* (Washington, 1962), p. 85; *Archiv des Völkerrechts*, 11 (1963-4), p. 77.

² U.N. Treaty Series, vol. 33, p. 181. For a discussion of the legal character of the Commission's acts, see Bokor-Szegö, 'La Convention de Belgrade et le régime du Danube', *Annuaire français de droit international*, 8 (1962), p. 192, especially at pp. 202-5.

Article 23, paragraph 2, clearly establishes the duty of members to 'have regard to the basic provisions governing navigation on the Danube' made by the Commission. Even so, the Commission still emerges as an organ equipped with law-making powers when it establishes, by virtue of a general decision, special charges under Article 10, paragraph 2, or when it lays down the 'instructions' that govern 'the procedure for levying the extraordinary navigation and special charges' (Article 38).

10. THE PROCESS AND PROCEDURE OF LAW-MAKING IN INTERNATIONAL ORGANIZATIONS

A number of procedural and related problems arise in connection with the enactment of law by international organizations, and those problems it is proposed to examine briefly in the present section.

The drafting of regulative enactments

The drawing up of regulative enactments within the framework of an international organization is often not dissimilar to negotiations on treaties conducted between States through diplomatic channels or at meetings of representatives. This applies particularly to enactments which are less technical and more general both in their content and effects, i.e. enactments which concern matters of policy and lay down obligatory rules thereon. Cases in point are: (1) much of the law that remains in force in the Organization for Economic Co-operation and Development, and (2) the basic regulations made by the Council of the European Economic Community. The element of negotiation is especially strong in acts adopted by unanimity or acts where, although a unanimous vote is not a requirement of validity, the consensus of all is sought as a guarantee of the observance and smooth application of the act. But drafting regulative acts is also a process that displays similarities to procedures of domestic organs of legislation. These analogies are strongest in the European Communities and can be explained by the adoption in these organizations of a number of devices which originate in the domestic public law of the member States and in trends that bear a relation to confederate or, perhaps, even federal patterns. Yet it is not in the European Communities alone that one finds analogies to national law-making. Whenever international business is transacted not in bilateral or multilateral negotiations through any of the traditional diplomatic instrumentalities (correspondence, talks, conference, etc.), but rather in the framework of an international organ in which several States are represented, the process of decision becomes institutionalized and parliamentary procedures begin to gain in influence and impress their stamp on international dealings. In essence, the making of

law by an intergovernmental organ must stand closer to the enactment of law by domestic bodies than to the conclusion of contractual instruments.

Usually several stages must be gone through before the act is adopted. This is well illustrated by the procedure in the International Civil Aviation Organizations. The drafting of the technical annexes to the Chicago Convention is progressively and gradually done by a hierarchy of organs: first, preparation by the Divisions, then extensive work by the Air Navigation Commission (this phase includes, *inter alia*, comments by member States), and finally adoption of the definitive text by the Council.¹ On the whole, it may be said that regulative acts falling under the purview of the present article are drafted carefully and with precision. In this respect they compare favourably with some of the enactments made in less developed countries or by less mature or competent domestic legislatures. In the European Communities the not uncommon duty of the law-making organ is to consult another organ of the Community before enacting the rules in question. Legislative action of the Council which must be preceded by advice or proposals on the part of the Commission is a frequent occurrence in the European Economic Community.

As a rule the regulatory power is vested in the organ where all the member States are represented. There are, however, a few exceptions. In the International Civil Aviation Organization law is made by the Council, which is composed of twenty-seven States—i.e. less than a quarter of the total membership (in September 1965 I.C.A.O. counted 110 members). In the European Coal and Steel Community regulative decisions are mainly adopted by the High Authority, an organ not composed of Government representatives and not receiving instructions from Governments. In the remaining Communities the Commissions, whose composition is similar to that of the High Authority, also exercise some legislative functions though, as already observed above, they are not numerous.

While co-ordination of the legislative action conducted by different organs of the same organization has so far been satisfactorily solved, co-ordination between different organizations is a much more difficult problem—and one which barely exists. The problem will indeed arise on a larger scale only if the organization's competence to make law increases visibly by comparison with its present modest scope. Today the overlapping of legislation *ratione materiae* is, or was, a practical question in the case of certain enactments of the European Economic Community and those of the European Coal and Steel Community; the latter had already enacted a number of rules on the common market for coal and steel before

¹ See I.C.A.O. Docs. 5417-AN/626, *Rules of Procedure for, and Directives to, Divisions* and 7215-AN/858 (1951), *Development and Coordination of Technical Annexes to the Convention*. The question is discussed by Mankiewicz, loc. cit., pp. 86-7 and Schenkman, op. cit., p. 259.

the former started its legislation relating to a common market for all goods and for an all-embracing economic union. That the need to co-ordinate is not foreign to the activities of organizations of a more universal membership is shown by the case of the technical rules on meteorological service for international air navigation which the World Meteorological Organization adopted when the I.C.A.O. had already drafted and made effective its technical annex on meteorology. During the debate in the former organization the representative of India pointed out the danger of possible confusion and difficulties if there were discrepancies between two sets of rules bearing on the same matter. In the particular case in question substantive problems were carefully delimited and divided between the two legislative acts. There was also some cooperation between the organizations concerned;¹ and no conflict appears to have arisen between their respective enactments. The question will, however, require attention if legislation by international bodies grows in quantity and importance.

Authentication of Regulative Acts

It has been said with respect to some regulative acts that their authentication lacks any *formality*. Indeed, there were cases in the former Organization for European Economic Co-operation where the act remained unsigned, only being published in the verbatim records of the legislating organ. Often, the approval given by the representatives of States sitting on the deciding organ of the O.E.E.C. was not subjected to any elaborate rules of procedure.² Yet in most organizations that are invested with regulatory powers the procedure of adopting the final text is complex, and several procedural stages may be distinguished before that in which the act is voted upon definitely. This observation applies particularly to the Specialized Agencies of the United Nations which have legislative competences and, of course, to the European Communities. In the latter, several technicalities of the process, such as the inclusion of certain formal clauses, are subject to specific provisions to be found either in the constituent treaties or in the implementing regulations.³ In connection with the legal nature of regulative acts considered above it may be noted that the lesser or greater degree of formalism in drafting and authenticating the text is not the kind of difference which would permit a clear distinction to be drawn between instruments accepted as regulations of an international organization and instruments concluded as treaties.

¹ *Second Congress of the World Meteorological Organization, Final Report* (1955), vol. 3, p. 77, and *I.C.A.O. International Standards and Recommended Practices, Meteorology*, (5th ed., 1961), p. 5.

² Freymond, loc. cit., pp. 71-2.

³ See, for instance, Decision No. 22/60 of 7 September 1960 of the High Authority of the European Coal and Steel Community, *Journal officiel des C.E.* (1960), p. 1248.

Regulative Acts not subject to Ratification

The law-making acts of international organizations are not subject to ratification.¹ If they were, they would cease to be a distinct source of law but would simply constitute a special procedure for the conclusion of agreements. The binding force of any regulative act has its basis and origin not in the subsequent approval of States but in the decision-making act of the international organ. A State which does not avail itself of the privilege that is inherent in the system of contracting out and tacitly approves the enactment does not execute an act of ratification. For ratification is always an explicit and formal act, and in the law of treaties, or any other law, there is no ratification by acquiescence.

Some aspects of the problem of ratification have already been touched upon when the legal nature of the regulative acts was discussed, and what was then said need not be repeated. Suffice it to say that a member State may always, if it so wishes, subject the act to ratification or to other procedures of approval. But here ratification or any other form of approval or supervision on the part of the competent organs of the State produces municipal effects only. Ratification or approval does not bear on the validity and binding force of the instrument.² If the State became bound by such an instrument because of the decision taken by the international organization and thereafter refused to ratify or approve and to apply the instrument, then there would arise a situation of non-compliance with an international obligation and not one where the existence of the obligation could be questioned. When the enactments of an organization are self-executing in the municipal sphere, which, for example, is the case with the law made by the European Communities, one may ask whether municipal approval has any effects whatever. In these cases all that a Government can do is to remain in close contact with its legislature so as to influence the law-making process in the Communities and to keep it in line with the policies of the domestic legislator.³ For once a Community has made law, the domestic organs must enforce it, and any modification of the Community law may prove a difficult and lengthy operation. As already stated, only in the Organization for Economic Co-operation and Development,

¹ See remarks by Münch in *Berichte der Deutschen Gesellschaft für Völkerrecht*, 2 (1957) at p. 312. As to W.H.O. regulations, see report by the Special Committee on Draft International Sanitary Regulations, W.H.O., *Official Records*, No. 35, p. 368 Doc. A/66, and *The First Ten Years of the World Health Organisation* (Geneva, 1958), pp. 278-9. Cf. also Merle, loc. cit., pp. 354-5. As to I.C.A.O. regulations, see Ros, loc. cit., p. 27.

² Cf. observations on the I.C.A.O. by Mankiewicz, loc. cit., pp. 89 and 91. For the incident involving Norway in the W.H.O., see above, p. 223.

³ For Federal German practice, see above, p. 222, n. 4. The influence of the executive, in contradistinction to legislative, organs is emphasized by Mosler, loc. cit., pp. 274-5 and Münch, loc. cit. Cf. Article 2 of the German Law on the ratification of the Treaty on the European Economic Community; Ipsen, 'Das Verhältnis des Rechts der europäischen Gemeinschaften zum nationalen Recht', *Aktuelle Fragen des Europäischen Gemeinschaftsrechts* (Stuttgart, 1965), p. 11.

under Article 6, paragraph 3, of its constituent Convention, is there room for the submission of regulative acts to ratification procedures similar to treaties. When this occurs, the act in question is tantamount to an agreement concluded in a special form. In the predecessor organization, which was the Organization for European Economic Co-operation, a similar possibility existed but was never taken advantage of.¹

Ratification by the individual member State is incompatible with the essential character of regulative acts as a source of law separate from treaty. Moreover, the absence of any requirement for ratification facilitates the entry into force and effectiveness of international instruments. Important treaties not infrequently remain of little significance or are crippled because of the fewness of the ratifications. It is true that Professor H. A. Smith, writing on the resolutions of the League of Nations which were not law-making in character, commented unfavourably that they were not subject to ratification, so that there was no opportunity for further study of their implications. Indeed, he added: 'It is difficult to imagine any law-making procedure better calculated to produce bad results.'² But he seems to be alone in that view. While it may be justifiable to criticize the manner in which certain resolutions of world organizations are drafted and adopted, the law-making activities discussed in the present paper do not warrant the conclusion that the absence of ratification has harmful results.

Reservations to Regulative Acts

Reservations may be made to regulative acts only if the reservations are allowed either by the treaty that establishes the competence of the organization or by the act itself. This is the reverse of the principle which governs the making of reservations to treaties. Reservations that conform to the object and purpose of the treaty can always be formulated (even if some parties object to them) unless the terms of the treaty provide otherwise.³

A right to make reservations to regulative acts is part of the system of contracting out in three organizations: the International Civil Aviation Organization, the World Health Organization and the World Meteorological Organization. In the other inter-governmental bodies equipped with powers of legislation, reservations are not, as a rule, permitted. In particular, the

¹ Cf. Article 18 (b) of the Rules of Procedure of the O.E.E.C. Bindschedler, *Rechtsfragen der europäischen Einigung* (Basle, 1954), p. 144, criticizes Article 18 (b) which deals with the technique of concluding treaties and not with the adoption of binding decisions by international organizations. Cf. Freymond, loc. cit., pp. 74-5 and Elkin, op. cit., p. 126.

² Smith, 'The Binding Force of League Resolutions', this *Year Book*, 16 (1935), p. 158.

³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, *I.C.J. Reports*, 1951, p. 15; International Law Commission, 17th Session, *Law of Treaties. Draft Articles Adopted by the Commission*, U.N. Doc. A/CN. 4/L. 107, p. 18, Article 18. See Art. 16 in the 1966 Draft. On the principle of unanimous consent, see McNair *The Law of Treaties* (Oxford, 1961), Chapter IX. Problems raised by the making of reservations to the International Sanitary Regulations are discussed by Vignes, loc. cit., pp. 659-64.

fourth organization where the system of contracting out has equally been accepted, namely the North-East Atlantic Fisheries Commission, does not admit reservations. On the other hand, in the Organization for European Economic Co-operation members were allowed to make reservations during the deliberations on the decisions. Such reservations were effective provided they were accepted by other members in the process of adopting the acts in the O.E.E.C. Council.

While in the World Meteorological Organization the freedom to formulate reservations appears to be practically unfettered, in the International Civil Aviation Organization a member who makes reservations with regard to the international standards of airworthiness or performance of aircraft or to international standards concerning personnel licences or certificates runs the risk of being excluded from, or limited in, its participation in international navigation (Articles 39 and 40). This risk constitutes a means of pressure against too liberal a recourse to reservations with regard to I.C.A.O. enactments. However, the best system, which contrasts favourably with the general law concerning reservations to treaties, is that found in Article 107 of the W.H.O. International Sanitary Regulations. Here the validity of each and every reservation depends on its acceptance by the World Health Assembly, as has been seen above in discussing the regulatory powers of the W.H.O. The International Sanitary Regulations take the decision concerning the effectiveness of a reservation out of the hands of individual Governments and subject it to the control and approval of an international organ. That organ decides only after careful study of the reservations and follows procedures which eliminate any element of arbitrariness.

The form of, and the conditions for making, reservations differ in the three organizations. But two rules emerge as common to them all. First, there is a definite 'deadline' for the exercise of the right of making reservations. Secondly, reservations have to be formulated in a separate instrument or letter which is transmitted to the organization, i.e. they are not made in the same instrument as the enactment itself.

Validity of Regulative Acts

The next question to be considered concerning regulative acts is their validity, and this has to be judged according to criteria that are different from those applicable in the case of treaties. The law regarding the validity (or, rather, invalidity) of treaties is permeated by the notion of contract and of the freedom of the parties. The usefulness of these notions in the present connection may be questioned for two reasons. First, they do not appear helpful in determining the validity of acts which are the outcome of techniques and procedures that differ from those used in the conclusion of treaties. Secondly, whenever member States confer regulative powers on

an international organization, they restrict thereby their own freedom of decision with respect to their rights and/or duties in regard to which the organization itself begins to make enactments. Naturally the restrictions differ from case to case. They are almost non-existent in organizations which make law by virtue of unanimous resolutions. Even here, however, the special procedure for acquiring new rights and duties may in fact place more restraints on the State than in the case of ordinary negotiations leading to the conclusion of a treaty. In the organization the State cannot vote for the act *ad referendum* or subject to ratification. The limits imposed on the State's freedom are visibly strict whenever the organization is competent to adopt the regulative act by majority. Here again, one has to distinguish between the treaty and the law enacted on the basis of the treaty. The latter comes from a source which is different from an agreement between States or other subjects of international law; and different also are the requirements for the validity of the regulative act.

The validity of regulative acts of international organizations must be ascertained in the light of the provisions that authorize and govern their enactment. These provisions are to be found in the treaty which establishes the legislating organization and governs its operation.

An act is invalid if the organization has made law on a subject not authorized by the constituent treaty. Therefore, the first question to be examined is whether there existed a treaty basis for the enactment and, secondly, whether the legislating organ kept within the bounds of the enabling treaty clause. Where the regulative act must state the reasons for its enactment, any discrepancy between those reasons and the treaty may result in the invalidity of the act (e.g. Articles 15 and 33 of the treaty establishing the European Coal and Steel Community).

A regulative act is void if it conflicts with a peremptory norm of general international law. Legislation by international organizations takes place in the framework of general international law. Such legislation cannot derogate from general international law nor can it, except in the case of an organization of a universal character, be a means for the revision of general international law.

Further, although the making of an act may conform to the competence of the organization, yet its validity may be open to question when rules governing the division of powers among the several organs of the organization, the process of legislation or the voting have been violated. If the treaty confers the function of legislation on one organ, this function cannot validly be transferred to another unless the treaty is amended. The act, in order to be valid, must be executed by the right organ¹ and strictly accord-

¹ Cf. the Court's dictum in the *Expenses* case stating a somewhat different principle relating to the competence of the United Nations in a matter other than legislation, *I.C.J. Reports*, 1962, at p. 168.

ing to the prescribed procedures. If one or more of the stages of law-making are omitted—for instance, if the draft act is not prepared by the prescribed organ or the required consultation has not taken place—the act is invalid. Equally, invalidity may result from irregularity in the voting—in particular, disregard of the required majority.

The effect of abstention in voting is of importance in organizations which adopt their enactments by virtue of unanimous resolutions. A study of the provisions on voting in those organizations shows that an abstention does not invalidate the resolution, but the resulting enactment is, as a rule, not effective with regard to the abstaining Member. However, it appears from the treaties establishing Benelux and the European Free Trade Association that mere abstention does not make a decision inapplicable to the abstaining State. The same principle is expressly stated in Article 148, paragraph 3, and in Article 118, paragraph 3, of the Rome Treaties of 1957.

With the significant exception of the European Communities no case is known where the substantive or temporal aspect of the validity of a regulative act has been in doubt. Be that as it may, it is perhaps not surprising that such cases do not normally arise. International organizations other than the supranational bodies of Western Europe not only have limited powers of law-making but exercise them rarely and without infringing the sovereignty of the member States.

On the other hand, the legislation which fills the pages of the *Official Journal of the European Communities* is an everyday phenomenon in the economic life of the member States. Basic economic interests of Governments, corporations, enterprises and individuals are at stake and, as the result, there is here more room for doubt and controversy regarding the validity of the law made by the Communities.

In the European Coal and Steel Community individual members or the Council have the right, under Article 33, to appeal to the Court of the European Communities

‘for the annulment of decisions and recommendations of the High Authority on the grounds of lack of legal competence, substantial procedural violations, violation of the Treaty or of any rule of law relating to its application, or abuse of power. However, the Court may not review the conclusions of the High Authority, drawn from economic facts and circumstances, which formed the basis of such decisions or recommendations, except where the High Authority is alleged to have abused its powers or to have clearly misinterpreted the provisions of the Treaty or of a rule of law relating to its application.’

The enterprises, and associations formed by them, have the right of appeal against general decisions and recommendations (i.e. acts of the nature of legislation) on the ground of abuse of power (*détournement de pouvoir*) affecting them. In practice, however, their appeals relate primarily to acts

directed at them individually, which by definition are not 'regulative' in character. The Court also has jurisdiction to annul, on the petition of a member State or of the High Authority, acts of the Assembly or of the Council 'on the grounds of lack of legal competence or substantial procedural violations' (Article 38).

In the case of the Communities established by the Rome Treaties, the Court, *inter alia*, may review their enactments—i.e. their regulations, their decisions of a general character and their directives. The Court has jurisdiction

'to give judgment on appeals by a member State, the Council or the Commission on grounds of incompetence, of errors of substantial form, of infringement of this Treaty or of any legal provision relating to its application, or of abuse of power.'

Corporations, enterprises and individuals ('any natural or legal person') may also appeal against law-making acts of the Communities if they can establish that such acts are 'of direct and specific concern' to them (Article 173 of the E.E.C. and Article 146 of Euratom). If the appeal is upheld, the Court declares 'the act concerned null and void' (Articles 174 and 147; relevant are also Articles 184 and 156). Questions of the validity of the regulative acts of the European Communities have been dealt with in a number of judgments of the Court. But considerations of space preclude their discussion in the present paper.¹

Finally, the validity of a regulative act may also come in question in the event of certain irregularities in the position of a representative in the law-making organ.² If a representative votes without full powers that are in good and due form, the act is invalid where his vote was necessary for a lawful decision, e.g. in the case of unanimous enactments. If, on the other hand, his full powers are in order but he votes in disregard of the instructions which he received from his Government, the vote and, consequently, the act are valid. Nor is the act invalidated when the participation of the representative in the process of law-making and his consent to the act do not comply with substantive or procedural provisions of the State's municipal law. His State may not declare his action null and void and it is bound by the enactment.

Personal coercion by whomsoever exercised with regard to the representative of a State would obviously vitiate his vote and consent, as would also coercion of his State. Equally, coercion of the legislating organ itself would necessarily make the act null and void. However, both the subject-

¹ The relevant cases are discussed by Bebr, *op. cit.* See also Delvaux, *La Cour de justice de la CECA* (Paris, 1962); Cheng, *loc. cit.* (above, p. 207, n. 6); and Cahier, *op. cit.* (above, p. 247, n. 3). See also the general observations by E. Lauterpacht, 'The Legal Effects of Illegal Acts of International Organisations', *Cambridge Essays in International Law. Essays in Honour of Lord McNair* (London, 1965), especially at pp. 95-7.

² They are discussed by Sørensen, *loc. cit.*, pp. 105-6.

matter and the conditions of law-making in modern international organizations make coercion a purely theoretical question, and the same applies to fraud and error as possible causes of invalidity.

Termination of Regulative Acts

The duration of most of the law enacted by international organizations is not expressed to be limited. It is intended to remain in force until replaced by new law, revised, or repealed. Regulative acts cannot be denounced by a member of the organization. Denunciation and withdrawal, if familiar in the law of treaties, are no part of the law governing the regulatory powers of intergovernmental bodies.

A regulative act may fix the date of its expiry or lay down a resolutive condition. It may equally be brought to an end by supervening impossibility of performance, i.e. the 'total and permanent disappearance or destruction of the subject-matter'¹ of the act. When the objective of the act ceases to exist, the act will itself terminate. Equally, the act may terminate if general international law changes and the law embodied in the act happens to be in conflict with the new rule of general international law.

The dissolution of an international organization is another possible cause for the termination of the regulative acts made by it, and there are two situations. First, if the organization is dissolved and is not replaced by a new organization having similar aims and tasks, the law made by the dissolved organization ceases to be binding. The former members may, if they so wish, decide that some or all regulative acts of the dissolved organization shall continue to be effective. However, the law in question then changes its nature and becomes part of the treaty law that is in force with regard to the States concerned.

On the other hand, the position is different if the organization is replaced by a new one, the membership of which includes all or most of the members of the earlier organization.² Here the law made by the dissolved organization can be, and probably should be, maintained. If the aims and tasks of the former organization continue to live in the present one, it is important that the legislative work of the former, which serves those aims and tasks, should not be wasted. The 'requirement of continuity of international life'³ demands that succession take place with respect to the regulative acts of the dissolved organization. But to maintain the effectiveness of

¹ Words borrowed from Article 43 of the I.L.C., *Law of Treaties, Draft Articles*, U.N. Doc. A/CN.4/L.107. Cf. Article 58 of the 1966 Draft, U.N. Doc. A/6309/Rev. 1.

² Cf. the classification by Hahn, 'Continuity in the Law of International Organization', *Duke Law Journal* (1962), pp. 382-3. The transfer of some functions of one organization to the other, without there being any dissolution, also raises problems of succession and the continuation of the law made by the organization, whenever the transferred functions included regulative powers.

³ Oppenheim, *op. cit.*, p. 168.

the law of the old organization, it is necessary for the members of the new organization so to agree in a treaty. The treaty may assign to the organization the decision as to the continuance in force of the previous law. In particular, the new organization may be given the power to determine the details of the succession. If among the members of the new organization there are States which did not belong to the former, and they are opposed to the maintenance of the law in the making of which they had no part whatever, there remains the possibility of a compromise solution whereby that law will continue in force only for the members of the dissolved body.

Interesting in this connection is the replacement of the Organization for European Economic Co-operation (1948) by the Organization for Economic Co-operation and Development (1960). The membership of the two bodies is identical, except that the later Organization includes Canada and the United States, which did not belong to the earlier. Article 15 of the O.E.C.D. Convention provided that the 'legal personality' possessed by the O.E.E.C. should continue in the new Organization, 'but decisions, recommendations and resolutions of the Organization for European Economic Co-operation shall require approval of the Council to be effective after the coming into force of this Convention'. The members of the O.E.E.C. in agreement with Canada and the United States then adopted the following rules regarding the continued effectiveness of the O.E.E.C. acts:¹

1. In accordance with Article 15 of the O.E.C.D. Convention only some of the O.E.E.C. acts were to remain in force (the 'rule of selection').²

2. The selection of acts was to take place by unanimous concurrence of the signatories to the treaty establishing the new organization. That concurrence was to be worked out and achieved in a special organ, the Preparatory Committee, which should submit the agreed recommendations on the subject to the new organization.

3. The acts of the former organization were to be classified in four categories: (a) acts to be retained without modification of substance and requiring only purely formal amendments, such as the change of the names of organs referred to in the acts; (b) acts to be retained with modifications of substance; (c) acts not to be retained as such but containing certain principles or rules worthy of retention or consideration; (d) acts not to be retained. Thus, succession was to occur only with regard to the first and second category of acts.

4. The new organization (i.e. the Council of the O.E.C.D.) had to approve the acts so selected; the decision to be made by unanimous vote.

5. The members of the new organization should agree in advance to vote in accordance with the recommendation of the Preparatory Committee. Subject, therefore, to

¹ See Memorandum of Understanding on the Application of Article 15 of the Convention on the Organization for Economic Co-operation and Development of 14 December 1960, *European Yearbook*, 8 (1960), p. 271, and Report of the Preparatory Committee, Part II, *ibid.*, p. 289. The application of Article 15 of the O.E.C.D. Convention is discussed by Kiss, 'Quelques aspects de la substitution d'une organisation internationale à une autre', *Annuaire français de droit international*, 7 (1961), pp. 482-3 and Hahn, *loc. cit.*, pp. 543-51.

² Hahn, *loc. cit.*, p. 544.

any modifications which might still follow from the application of rules (6)–(8) below, the actual decision was to be placed in the hands of the Preparatory Committee.

6. A non-member of the dissolved organization, however, 'should have a certain latitude with respect to the said recommendations'.¹ In particular, the non-member might notify the Preparatory Committee of any recommendation which it would not be bound to vote in favour of in the new organization. In such cases its duty would be to abstain from voting if the recommendation in question should not afterwards have been modified by the Preparatory Committee.

7. If the notice under rule (6) were given, then any other Signatory of the treaty establishing the new organization might request the reconsideration of the whole or part of the recommendation in question by the Preparatory Committee. The request could be made if in the view of the Signatory the notice under rule (6) effected 'in an important respect' a change of the situation in regard to the recommendation or to a given part.

8. If the reconsideration of the recommendation in question resulted in its modification, the non-member of the dissolved organization was to have the right to abstain from voting thereon in the new organization. In other words, unlike the case under rule (6), the State in question might vote against the modified recommendation.²

9. Abstention in voting was not to invalidate the act, but only make it inapplicable to the abstaining member.

It may be added that the withdrawal of a member from an organization does not terminate regulative acts in the making of which the withdrawing member participated. It terminates the effect of the act only for that member. Article 110 of the International Sanitary Regulations which, rather exceptionally, provides for the effectiveness of its Regulations for States which are not members of the World Health Organization, has been already discussed (above p. 224).

II. REGULATIVE ACTS AND MUNICIPAL LAW

The problem of the place which regulative acts of international organizations have in the municipal law of member States should be considered under two headings. First, there is the question of their effectiveness in the internal law and before the domestic organs of members. Secondly, in case of a conflict between a rule made by an international organization and a rule of domestic law, there is the question which of the two rules is to prevail in the member's domestic law.

State practice, domestic law and the opinions of jurists furnish a number of solutions to these questions in the context of the relation between, on the

¹ Words used in the preamble to the Memorandum of Understanding referred to above, p. 264, n. 1.

² In view of the principle of unanimity which is in force in the O.E.C.D., the voting against would have the result of reversing the act in question. Actually, this did not happen 'as Canada and the United States did not make use of the legal facilities accorded to them by the Memorandum of Understanding', Hahn, loc. cit., p. 548.

one hand, municipal law and, on the other, international customary or treaty law. A certain analogy¹ between those solutions and the determination of the place which international regulative acts should have in a system of national law is inevitable. The analogy does not, however, necessarily originate in any *a priori* adoption of any particular theory, be it the monist or the dualist doctrine. The law made by international organizations is international law, and in the domestic sphere municipal law is primarily to be contrasted with the *whole* of international law. The different sources from which the several international rules originate are a distinct problem, to which the national organ need not always devote attention. The Constitutions of States do not necessarily differentiate between the procedures which give birth to a new international obligation of the State, but rather between the different subject-matters of the obligation entered into.²

If, on the other hand, municipal law does differentiate, as not infrequently happens, between the sources from which international legal rules emanate, providing for them a place that depends on their source, then there is room for the analogous application to the regulative acts of international organizations of patterns which in State practice and municipal law have been worked out with regard to treaties.³

From the point of view of municipal law there is identity of substance between treaties that purport to bring about certain effects inside the State, and regulations adopted by international organizations with the same purpose in mind. For instance, the International Sanitary Regulations of the World Health Organization superseded several conventions concluded earlier by Governments for exactly the same purpose. The relation of either a treaty or of a regulative act to municipal law raises essentially the same questions. The municipal lawyer is not here confronted with any new problem, his difficulties being rather of a technical nature. Nor is there any inherent obstacle to applying *mutatis mutandis* the solutions which municipal law provides for cases involving treaties. But, as will be shown below, there are limits to the analogies with treaties.

The status of law-making resolutions in the municipal sphere is of paramount importance, since their purpose can be achieved only if they have obligatory force for the domestic organs of the State, and for indi-

¹ This is pointed out, *inter alia*, by Münch, 'Die Abgrenzung des Rechtsbereiches der supranationalen Gemeinschaft gegenüber dem innerstaatlichen Recht', *Berichte der Deutschen Gesellschaft für Völkerrecht*, 2 (1957), pp. 82 et seq.; Merle, loc. cit., p. 357; Scheuner, op. cit., *passim*; Schlochauer, loc. cit., *passim*.

² Cf. Freymond, loc. cit., p. 82.

³ Cf. de Visscher, 'La Communauté Européenne du Charbon et de l'Acier et les États membres', *Congrès International d'Études sur la C.E.C.A.* (Milan, 1957), p. 55. Reuter, op. cit., above, p. 226, n. 2, mentions the difficulties which, in his opinion, a municipal court would face if the domestic law regulated only the relationship between itself and treaties and were silent on the position of regulative acts. Cf. also Rousseau, op. cit., pp. 868-9.

viduals and corporations. The review of regulative acts in the preceding Sections justifies the conclusion that, whether they deal with transport and communications, public health, trade or economic life in general, these acts primarily concern not the mutual relations of States or their jurisdiction but questions which arise and must be solved internally within each State. Regulative acts can play their true role only when they penetrate into internal law and administration.

The Effectiveness of Regulative Acts in Internal Law

State practice and the relevant provisions in the constituent treaties of the legislating organizations show that the problem of the effectiveness of regulative acts in internal law has been solved in one way for traditional international organizations and in another for the supranational European Communities.

The law made by international organizations other than the European Communities is not automatically of its own force part of the internal legal orders of the member States.¹ National action is necessary to introduce that law and make it effective in the municipal sphere.² Writers³ sometimes refer to the decisions of the International Air Navigation Commission established under the Paris Convention of 1919 as international regulations directly and automatically applicable in the municipal systems of the member States. The Commission admittedly had the power to amend annexes A–G to the Convention. But without investigating whether the acts of the Commission (which were only revisions of instruments that were already in force in the member States by virtue of those States' consent) did operate automatically in internal law, it must be emphasized that this is not the case today with the regulative acts of most international organizations. To be effective and applicable in the domestic sphere, they must normally undergo transformation, or some kind of remission (*renvoi*), or be backed up by legislative action by the State.

¹ Mosler, loc. cit., p. 286.

² With regard to the Rhine regulations, see Walther, 'Le Statut international de la navigation du Rhin,' *European Yearbook*, 2 (1954), p. 14. With regard to the I.C.A.O. Annexes, see the debate on their internal binding force which took place in the Council in 1951, and especially the United Kingdom's view that the Annexes acquired binding force in the territory of each member only through national legislation: I.C.A.O. Docs. 7328–15/16/17/18, C/835, pp. 169, 181, 193 and 209; and 7361–5/13/15, C/858, pp. 56, 162 and 192, cited by Mankiewicz, loc. cit., p. 89; see also Riese, *Luftrecht* (Stuttgart, 1949), pp. 118–19 and 126–8; Chauveau, *Droit aérien* (Paris, 1951), p. 350; Mankiewicz, loc. cit., pp. 89, 90 and 93; Malintoppi, 'La Fonction "normative" de l'O.A.C.I.' *Revue générale de l'air*, 13 (1950), p. 1053; Schultz, loc. cit., p. 56. With regard to W.H.O. regulations, see *The First Ten Years of the World Health Organisation* (Geneva, 1958), p. 264. For contrary views, with which this writer does not agree, see Jenks, loc. cit., (above, p. 215, n. 1), at pp. 34–5 and Le Goff, 'L'activité des Divisions techniques au sein de l'O.A.C.I.', *Revue générale de l'air*, 14 (1951), p. 426. Cf. Sandorski, op. cit., on the Comecon resolutions.

³ See, for instance, Mankiewicz, loc. cit., p. 90.

Transformation effects the reception of the act into the municipal system. It may be either general, as when the national law provides in advance for the introduction of a wide category of international rules into the municipal system. Or it may be particular, when a specific act or rule made by an international organization is given legislative approval and thereby introduced into the municipal law. Thus, I.C.A.O. Annex No. 2 was transformed into French law by virtue of Decrees Nos. 57-597 and 57-598 of 13 May 1957, and it is interesting to note that the transformation of Annexes Nos. 6 and 14 was accomplished through acts of a lower rank than the decree.¹ Again, the publication of the International Sanitary Regulations in the *Journal of Laws of the Federal Republic of Germany* transformed them into the federal law of the country.²

The term remission (*renvoi*) is here used in a loose sense not identical with that found in the conflict of laws; it is intended to denote a provision of internal law which indicates the acts of the organization as the source of the law to be applied by the national court or executive organ. In these cases the international rule does not become an actual part of internal law, but is nevertheless effective in the domestic sphere.

Finally, instead of resorting to any of these methods a State may introduce new legislation embodying the substantive rules of the international act. Then the international regulative act will not be effective as such in the State concerned; only the new municipal law which introduces its substance into internal law. Thus, the technical annexes of I.C.A.O. provide 'principles for incorporation into the regulations and administrative practices of each Contracting State'.³ Again, the internal law of members of the World Health Organization relating to quarantine had to be revised as a result of the adoption of the International Sanitary Regulations.⁴

The manner in which regulative acts of an international organization are promulgated and published in a State may differ. In some States they are published in the journal of laws, official journals, or Government gazettes. In France the possibility of publishing a special bulletin has been envisaged.⁵ In France also, provided the act meets certain requirements,

¹ Merle, loc. cit., p. 358.

² *Bundesgesetzblatt* (1955), Part II, p. 1062, though the Federal Government officially explained that the Regulations related to the rights and duties of the Government. The explanation was made because of certain doubts regarding the conformity of the Regulations with the Federal Constitution (*Grundgesetz*) which were raised in the Federal Council (*Bundesrat*); see Böhmer and Walther, 'Völkerrechtliche Praxis der Bundesrepublik Deutschland in den Jahren 1949 bis 1955', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 23 (1963), pp. 185-6.

³ I.C.A.O. *International Standards and Recommended Practices*, Annex 7 (2nd printing, 1953), p. 6; Detter, op. cit., pp. 255-8.

⁴ *The First Ten Years of the World Health Organisation* (Geneva, 1958), p. 264.

⁵ By the Decree 53-192 of 14 March 1953, *Journal officiel de la République Française: Lois et décrets* (1953), p. 2436.

its publication in the official journal or bulletin of the organization is sufficient to make it effective in French law.¹

The law made by the European Communities, on the other hand, is directly binding and applicable in the domestic legal systems of the member States. No legislative or other action is necessary to make that law effective in domestic law. This feature of the regulative acts of the Communities, in particular of their general decisions and regulations, derives from the fact that the members delegated part of their national legislative powers to the Communities.² Moreover, in the constituent treaties members accepted obligations from which the self-executing character of the law made by the Communities had to be inferred (Article 15, paragraphs 2 and 3, Article 86, paragraph 1, and Article 92 of the E.C.S.C. Treaty; Articles 191 and 192 of the E.E.C. Treaty; and Articles 163 and 164 of the Euratom Treaty). The direct applicability of the law of the Communities in the jurisdictions of the members, and the resulting absence of any transformation or similar procedures, find support in the decisions of the Court of the Communities.³ Nevertheless, among writers the traditional approach still prevails of regarding the law of the Communities as transformed and incorporated into municipal law.⁴

The different treatment of the problem of effectiveness in internal law in the European Communities and in other organizations is explained by the role which the regulatory power fulfils in each of the two groups of organizations. In traditional organizations the power of law-making is only one of the instrumentalities, and definitely not the most important, whereby the organizations carry out their tasks. In other words, the making of law is neither the dominant nor the indispensable function of these organizations. The picture is different in the European Communities, especially in the European Coal and Steel Community and the Economic Community. Legislation for members, their enterprises and nationals is a function which is basic for the attainment of the purposes of the Communities. If the effectiveness of that fundamental function could be put in jeopardy through the non-application of the enactments of the Communities in the municipal sphere, the usefulness of the existence of the Communities

¹ This is so 'lorsque ces règlements sont intégralement publiés dans le Bulletin officiel de cette organisation, offert au public, et lorsque cette publication suffit, en vertu des dispositions expresses d'une convention engageant la France, à rendre ces règlements applicables aux particuliers'; Article 3 of the Decree cited in the preceding note. Merle, loc. cit., p. 358 explains that this provision has been adopted in view of France's participation in the European Coal and Steel Community.

² Cf. de Visscher, loc. cit., p. 56. Cf. also the writings and opinions discussed by Ipsen, loc. cit., pp. 7-10.

³ Joint Cases Nos. 7/54 and 9/54, *Recueil de la jurisprudence de C.J.C.E.*, 2 (1954-5), p. 91; Case No. 6/64, *ibid.*, 10 (1964), p. 1159; and Case No. 26/62 cited above, p. 247, n. 1.

⁴ Scheuner, loc. cit., *passim*. Ipsen, loc. cit., pp. 2-5 discusses this approach; according to him, it dominates the German writings on the subject, *ibid.*, p. 4. For the doctrine of indirect transformation, see Schlochauer, loc. cit., pp. 24 et seq.

could be questioned. The process of integration, by definition, requires a number of centralized and uniform measures, and only their strict application by all can guarantee the success of the Communities. Accordingly, the acts of the Communities are published in the *Official Journal of the European Communities* and it is unnecessary for their effectiveness in internal law that they should be promulgated and republished in the official publications of the member State.¹

Cases of Conflict between Municipal Law and International Regulative Acts

The question remains whether, in case of conflict, superiority should be accorded to the internal rule or to the rule embodied in the regulative act. Again, one answer must be given for the traditional international organizations and a different one for the European Communities.

In the case of organizations other than the European Communities the conflict is solved on the same principles as conflicts between treaties and internal law. Here the analogy to treaties is complete, and national organs, whether judicial or administrative (executive) will proceed according to the patterns established in their respective countries with regard to treaty obligations of the State. If priority is always or sometimes given to internal law, the act of the organization is not applied and the responsibility of the State will in consequence be engaged for a violation of its obligations towards the organization and the other members. But it cannot be said that the law of international organizations or international law in general specifically prescribes that law-making acts of the organizations, when in conflict with the municipal law, are to prevail.

The position is different in the European Communities. Their objects could not be attained were the law of the Communities inferior to the national legal orders. In particular, the economic union would be unthinkable if individual members were legally in a position to hamper, through their domestic laws, common measures taken for the achievement of the goals set in the constituent treaties. Admittedly, no Article in any of the treaties expressly proclaims the superiority of the law made by the Communities over the municipal laws of the member countries.² It is the functional interpretation of those treaties³ rather than any specific provision⁴ which dictates the superiority of the Community law.

¹ Cf. the provision of the French Decree quoted above, p. 269, n. 1.

² Bülow, op. cit., p. 46.

³ Cf. Jaenicke, 'Das Verhältnis zwischen Gemeinschaftsrecht und nationalem Recht in der Agrarmarktorganisation der Europäischen Wirtschaftsgemeinschaft', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 23 (1963), p. 485. Cf. Ipsen, loc. cit., pp. 10-12. Jaenicke's approach is pragmatic and he does not *a priori* accept the principle of automatic 'Rechtsanwendungsvorrang des Gemeinschaftsrechts'. On the other hand, see Wohlfahrt, loc. cit., p. 30.

⁴ Attempts have been made in this direction, cf. the writings on Article 177 of the E.E.C. Treaty discussed by Ipsen, loc. cit., pp. 5-7. Nor is the answer to be found in interpreting the

However, some writers maintain that conflicts between municipal and community laws should be solved on the same general principles as govern the relation between municipal law and international law.¹ As already stated above, these principles may lead to the superiority of the municipal rule. Thus, some municipal judicial decisions have applied the maxim *lex posterior derogat priori* in cases involving a conflict between the law of the Communities and municipal law with the resulting possibility that municipal law might prevail over a Community act.² These decisions are, however, exceptional.

The attitude of the Communities themselves leaves little doubt that in their view the Community law is always to prevail over that of a member State.³ The Court of the Communities, it is true, for a long time avoided any pronouncement on the subject, adhering to the theory that the two legal orders were separate from each other.⁴ However, decisions rendered in cases Nos. 26/62⁵ and 6/64⁶ put the Court clearly on the side of the doctrine which asserts the superiority of the Community Law over municipal law.⁷

CONCLUSIONS

In the course of a century international organizations have developed different ways and techniques of participating in the legislative process in the international community. Their activities in this field fall under one of two categories. Either the organization cooperates with States or with other international organizations in making or promoting new law, or the organization itself creates law by its own acts.

powers of the Communities on quasi-federal lines, and—particularly—in assuming that, in some fields, the national legislative powers are supplanted by the powers of the Communities (the theories by Ophüls, Wohlfahrt and, generally, lawyers on the staff of the Communities, *ibid.*, pp. 7-10).

¹ Scheuner, *op. cit.*, p. 241; Schlochauer, *loc. cit.*, pp. 27 et seq.; Ipsen, *loc. cit.*, pp. 2-5 who critically discusses this attitude.

² The decision of the Italian Constitutional Court of 24 February 1964, *Foro Italiano* (1964) vol. 1, p. 465. Cf. Bülow, *op. cit.*, p. 49.

³ Cf. the outspoken opinion by Professor Walther Hallstein in his speech before the European Parliament on 18 June 1964 and reprinted in the introduction to the Seventh Annual Report of the European Economic Community. Ipsen, *loc. cit.*, pp. 16-17.

⁴ Bülow, *op. cit.*, p. 47.

⁵ *Recueil de la jurisprudence de C.J.C.E.*, 9 (1963), pp. 23-4.

⁶ *Ibid.*, 10 (1964), pp. 1150 et seq.

⁷ The writings on the relations between the law of the Communities and municipal laws of the member States grow in number. See works cited by Schlochauer, *loc. cit.*, *passim* and selected bibliography given in *Semaine de Bruges 1965; Droit communautaire et droit national*, at pp. 17-18. The recent collective explorations on the subject deserve attention: see the *Bruges* papers referred to, including contributions by Lagrange, Catalano, Sohler and Münch and *Aktuelle Fragen des europäischen Gemeinschaftsrechts* (Stuttgart, 1965), in particular papers by Ipsen and Bülow. See also Bebr, 'The Relation of the European Coal and Steel Community to the Law of the Member States', *Columbia Law Review*, 58 (1958), p. 767, and by same author, 'The Relationship between the Community Law and the Law of the Member States', *International and Comparative Law Quarterly*, Suppl. Publ. No. 4 (1962), p. 1. See also Detter, *op. cit.*, pp. 272 et seq.

Under the first head, international organizations make or promote new law in a number of different ways. For example, their practice is an important element in the growth of customary law.¹ Again, organizations often assist in, or themselves undertake, the preparation of drafts of multi-lateral treaties of general interest to be concluded by States. Indeed, codification of international law today owes much of its impetus and scope to international organizations. Similarly, international organizations have acquired important and diversified powers with respect to the revision of treaties.² Apart from drafting amendments which become effective only when they are accepted by all parties, or are binding exclusively for those who ratify them, there exist in international organizations more subtle techniques for revising treaties. In some cases the organization drafts, by a majority decision, amendments which are to become obligatory for all members if a majority of them accept or ratify the new text, e.g. amendments to the Charter of the United Nations. In other cases, the constituent instrument does not provide that the minority are to be bound by any revisions brought about by the majority, but the minority must choose between submitting to the opinion of the majority and accepting the revised instrument or ceasing to be a party to the instrument, which will thereafter be in force only in its revised form, e.g. the revisions of the Convention of the Universal Postal Union or the Railway Transport Conventions (C.I.V. and C.I.M.). In yet other cases, the organization has the power to amend its own constitution with binding effect for member States, e.g. Food and Agriculture Organization, U.N.E.S.C.O., or the European Coal and Steel Community. This last case is, of course, one of enactment of law by the international organization for the member States.

In addition, international organizations themselves conclude treaties, and the number of treaties to which they are parties is growing rapidly. Moreover, these treaties have greatly enlarged the scope of matters that are now of international concern and subject to international legal regulation.³

Yet another form of participation by international organizations in the

¹ Schachter, 'The Development of International Law through the Legal Opinions of the United Nations Secretariat', this *Year Book*, 25 (1948), p. 91; Jenks, *The Common Law of Mankind* (London, 1958), p. 175; Wolfke, *Custom in Present International Law* (Wrocław, 1964), pp. 82-4. See, generally, Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford, 1963), *passim*.

² Schwelb, 'The Amending Procedure of Constitutions of International Organizations', this *Year Book*, 31 (1954), p. 49.

³ The bibliography on the treaty-making power of international organizations is very large. See in particular Zemanek, *Das Vertragsrecht der Internationalen Organisationen* (Vienna, 1957); Schneider, *The Treaty-Making Power of International Organizations* (Geneva, 1959); Kasme, *La Capacité de l'Organisation des Nations Unies de conclure des traités* (Paris, 1960); Socini, *Gli accordi internazionali delle organizzazioni inter-governative* (Padua, 1962); Chiu, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties so Concluded* (The Hague, 1966).

law-making process is the adoption of non-binding resolutions, e.g. recommendations, which effect the growth and development of international law. Sometimes they are declaratory of existing international law. Sometimes they elucidate customary law on the subject under discussion and prepare the way for its eventual codification by treaty, e.g. the United Nations Draft Declaration on Rights and Duties of States.¹ Sometimes they confirm and reinforce the law in a field where it seemed controversial, e.g. the General Assembly's resolutions on war crimes and trials of war criminals.² Moreover, elements of new law indicating attempts at law-making are to be found in some resolutions, for example, in the United Nations resolutions on human rights,³ new nations⁴ and outer space.⁵

Against this impressive background of the various forms,⁶ methods and techniques whereby international organizations participate in the development of international law, the direct enactment of law by organizations described in the present article may seem of lesser significance and limited for the most part to matters of secondary importance. The regulative acts of international organizations extend only to some technical fields of inter-governmental co-operation. It is true that important economic problems are not absent from these fields. But large and wide powers of legislation have so far been given only to the European Communities. In consequence, the model of supranational organization has remained confined to the six States and has had little, if any, influence on the development of other international organizations.

Yet the creation of new rules of international law through the regulative acts of intergovernmental organs or organizations is an existing fact of the contemporary international scene. A new category of international legal rules has arisen which, strictly speaking, are neither customary nor contractual in character. While the internal law of international organizations grows rapidly and the power to make it can now be implied, rules enacted by them that create direct duties or direct rights for States are still infrequent and, if it is to be able to make them, the organization must have been granted unequivocal and express competence to that effect in its constitution.

The emergence of legal rules created by international organizations has enriched the technique of international law-making with novel practices and devices. Furthermore, the techniques and methods of the national

¹ G.A. Resolution 375 (IV).

² G.A. Resolutions 95 (I), 96 (I) and 180 (II).

³ E.g. G.A. Resolutions 217 (III), 1386 (XIV) and 1904 (XVIII).

⁴ E.g. G.A. Resolutions 637 (VII) and 1514 (XV).

⁵ E.g. G.A. Resolutions 1721A (XVI) and 1962 (XVIII).

⁶ This writer briefly surveyed these forms in his article cited above, p. 231, n. 2. And see Lachs, 'Współczesne organizacje międzynarodowe i rozwój prawa międzynarodowego' (Contemporary International Organisations and Development of International Law), *Państwo i Prawo*, 18 (1963-II), p. 827.

legislative process have begun to find their way into law-making on the international plane. On the other hand, the procedures in international organizations for creating legal rules for States are still heavily influenced by the contractual aspect of international law. The frequent requirement of unanimous decisions, the possibility for the individual State to reject an enactment passed by majority vote, the right to make reservations, the possibility of abstentions, and other procedures respecting the principle of consent as the basis of obligation, lead to the conclusion that international legislation in the strict sense of the term is still *in statu nascendi*, and its development far from terminated. However, the importance of the process is not diminished by the fact that today we witness only its modest beginnings. The treaty, in Lord McNair's words, continues to fulfil its traditional role as 'the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions'.¹ International organizations, however, have initiated a trend which in time may gain in significance and change the present dominant position of contractual instruments. In this context the role and significance of regulative acts of international organizations appears far from negligible.

¹ McNair, 'The Function and Differing Legal Character of Treaties', this *Year Book*, 11 (1930), p. 101. Cf. also Hudson, *op. cit.*, p. xv, n. 3.

MULTILATERAL TREATIES AS EVIDENCE OF CUSTOMARY INTERNATIONAL LAW*

By R. R. BAXTER

Professor of Law, Harvard University

I

THE usual manner of advocating or proving the existence of a rule of international law grounded in a 'general practice accepted as law'¹ is to adduce in an essentially undifferentiated way all of the evidence in support of the rule that may be found in the practice of States. The evidence—the 'material sources'—may take a great variety of forms. In his recent treatise, Dr. Brownlie lists, according to a conservative count, no less than fifteen categories.²

This evidence, whether in the form of diplomatic correspondence, the decision of a municipal court, a resolution of an international organization, a decision of an arbitral tribunal, a press communiqué or a municipal statute, is then sifted and synthesized in the mind of the advocate or decision-maker and the existence of the rule thus established. The practice of five or ten States, not on its face wholly consistent, may be sufficient to establish that the asserted rule constitutes a general practice creative of legal rights and duties for States and individuals. If this is a fair description of the process of proof of law, it must be of some importance to determine the validity and probative force of various types of evidence and to determine the weight that a given category of evidence should carry, relative to other forms of evidence. If this inquiry is not made, the proof of international law must inevitably be highly impressionistic or even non-rational, being governed only by the presumed good judgment of him who asserts the existence of the rule.

Both multilateral and bilateral treaties are not infrequently cited as evidence of the state of customary international law. In the *Nottebohm* case³ the International Court of Justice found that State practice as reflected in the Bancroft Treaties⁴ and in a Pan-American Convention of 1906 on

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¹ Statute of the International Court of Justice, Article 38, paragraph 1 (b).

² *Principles of Public International Law* (1966), p. 4.

³ *I.C.J. Reports*, 1955, p. 4 at pp. 22 and 23.

⁴ See, e.g., Naturalization Convention between the United States of America and Baden, signed at Carlsruhe, 19 July 1868, Malloy, *Treaties, Conventions, International Acts, Protocols*

the status of naturalized citizens,¹ as well as the Hague Convention of 1930 on the Conflict of Nationality Laws,² bore out the necessity of a 'genuine link' between a State and its national if an international claim was to be presented on behalf of that individual. The Court did not explain why a series of bilateral treaties concluded by the United States in the nineteenth century with a number of German States which had subsequently lost their separate identities (treaties which, moreover, had ceased to be in effect many decades before), a Pan-American Convention of regional application, and a codification treaty not shown to be in force between the litigating States should be persuasive evidence of a rule of customary law. And the authorities are heard to say that treaties, whether bilateral or multilateral, are 'sources' of international law by reason of a 'widespread process of transformation of treaty law into international customary law'.³

The purpose of this article is to determine what probative force multilateral treaties may carry as evidence of customary international law. With that end in mind, the following phenomena must be distinguished as irrelevant to the present inquiry:

1. The creation of usages through multilateral treaties, as, for example, the adoption of a system of diplomatic ranks under the influence of the regulations adopted at the Congress of Vienna.⁴

2. The influence of treaties in breaking down the barriers of strict State sovereignty. It does not require elaboration that the conclusion of treaties pertaining to a certain subject may indicate that the matter is becoming one of international concern and is gradually ceasing to be a question within the domestic jurisdiction of States.⁵

3. The role of multilateral treaties as accumulated wisdom. A multilateral treaty may, like a series of bilateral treaties,⁶ embody a formula or a convenient solution to a legal problem that may commend itself to other

and Agreements between the United States of America and Other Powers, 1776-1909, vol. 1 (1910), p. 53.

¹ Convention Establishing the Status of Naturalized Citizens who Again Take up Their Residence in the Country of Their Origin, signed at Rio de Janeiro, 13 August 1906, *British and Foreign States Papers*, vol. 103 (1909-10), p. 1010.

² Convention on Certain Questions relating to the Conflict of Nationality Laws, opened for signature at The Hague, 12 April 1930, *United Kingdom Treaty Series*, No. 33 (1937), Cmd. 5553, *League of Nations Treaty Series*, vol. 179, p. 89.

³ Schwarzenberger, *The Inductive Approach to International Law* (1965), p. 34; see Friedmann, 'The Changing Dimensions of International Law', *Columbia Law Review*, 62 (1962), p. 1147 at p. 1163.

⁴ *Règlement sur le rang entre les agents diplomatiques*, signed at Vienna, 19 March 1815; Martens, *Nouveau recueil de traités*, vol. 2 (1818), p. 429; *British and Foreign State Papers*, vol. 2 (1814-15), p. 179.

⁵ Schwarzenberger, loc. cit.,

⁶ As, for example, the air transport agreements which follow the form of the Agreement between the Government of the United Kingdom and the Government of the United States of America relating to Air Services between their Respective Territories, signed at Bermuda in February 1946, *United Kingdom Treaty Series*, No. 3 (1946), Cmd. 6747.

States in the solution of like problems. The parties to the Warsaw Pact found suitable the formula of the N.A.T.O. Status of Forces Agreement¹ with respect to criminal jurisdiction over visiting forces when it became necessary for these Socialist States to conclude similar agreements concerning their own forces.²

4. The exchange, through a process of bargaining, of economic or political rights, as under the General Agreement on Tariffs and Trade,³ and the establishment of international organizations through multilateral treaties.

5. The accretion about the constitutive instruments of international organizations of a body of customary international law having to do with the internal regulation, the functions, and the competence of the organization.⁴ The term 'United Nations law' has been applied to law which has grown up in this way about the Charter.

6. The creation of customary rights under international law, whereby régimes established pursuant to multilateral treaties are recognized and are respected by those States that are not parties to the instruments.⁵ The régimes established for international waterways⁶ and the neutralization of States and territory are the examples commonly given. The matter is complex, being inseparable from problems about the rights and duties of third States under treaties, the existence of international servitudes and of 'objective régimes', and the creation of local customs.

A multilateral treaty not falling within one of the foregoing categories may be regarded as declaratory of customary international law in either of two senses—as incorporating and giving recognition to a rule of customary international law that existed prior to the conclusion of the treaty or, on the other hand, as being the *fons et origo* of a rule of international law which subsequently secured the general assent of States and thereby was transformed into customary law. In both instances the treaty may be taken as evidence of State practice, and the weight that the treaty will carry is roughly proportionate to the number of parties to the treaty. If fifty States are parties to a treaty that represents itself as reflecting customary international law, the treaty has the same persuasive force as would evidence of

¹ Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, signed at London, 19 June 1951, *United Kingdom Treaty Series*, No. 3 (1955), Cmd. 9363.

² See, e.g., Agreement between Hungary and the Soviet Union on the Status of Soviet Troops stationed in Hungary, signed at Budapest, 27 May 1957, *British and Foreign State Papers*, vol. 163 (1957-8), p. 420.

³ Signed at Geneva, 30 October 1947, *ibid.*, vol. 148 (1947-Part II), p. 759.

⁴ See Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963).

⁵ As reflected in the Commentary on Article 34 of the Draft Articles on the Law of Treaties, Reports of the International Law Commission covering the work of the second part of its seventeenth session and on the work of its eighteenth session, 1966, *G.A.O.R.*, 21st Session, Supplement No. 9 (A/6309/Rev. 1) (1966), p. 61; *American Journal of International Law*, 61 (1967), p. 248 at p. 375.

⁶ See the writer's *The Law of International Waterways* (1964), pp. 177-86.

the State practice of fifty individual States. Moreover, since the treaty speaks with one voice rather than fifty, it is much clearer and more direct evidence of the state of the law than the conflicting, ambiguous and multi-temporal evidence that might be amassed through an examination of the practice of each of the individual States. Having regard to the limited amount of State practice which is generally regarded as sufficient to establish the existence of a rule in customary international law, a treaty to which a substantial number of States are parties must be counted as extremely powerful evidence of the law. Of course, as is true of any rule extracted from the State practice of a number of nations, the force of the purported rule is enhanced or diminished by the absence or presence of conflicting practice on the part of other States.

The obvious instance of the treaty that purports to be declaratory of customary international law is the codification treaty in which there is some express reference to the fact that the treaty was intended to reflect the state of customary international law. At the opposite extreme is the treaty or the individual clause of a treaty which was at the time of its adoption firmly regarded as constitutive of new law but which has, in the course of time, come to be taken as evidence of the law as it exists today. One such treaty provision is the prohibition of privateering contained in the Declaration of Paris of 30 March 1856.¹

Midway between these two types of treaty lies the agreement that does not expressly purport to codify or to be declaratory of customary international law and yet did not at the time of drafting create new international law which only subsequently gained the acquiescence of States. This form of treaty is consistent with customary international law as it exists independently of the treaty. To that extent its adoption by a group of States may act in confirmation of customary international law as established by evidence of State practice outside the treaty. The 'complete and exclusive sovereignty over the airspace above its territory' that the contracting States to the Chicago Convention of 1944 possess² had hitherto been recognized

¹ For text see Malkin, 'The Inner History of the Declaration of Paris', this *Year Book*, 8 (1927) p. 1. The English translation in *British and Foreign State Papers*, vol. 46 (1855-6), p. 26, is there described as inaccurate.

As stated in the Preamble, '... Il y a avantage, par conséquent, à établir une doctrine uniforme...' on maritime law in time of war which 'a été pendant longtemps l'objet de contestations regrettables.'

² Convention on International Civil Aviation, signed at Chicago, 7 December 1944, Article 1, *United Kingdom Treaty Series*, No. 8 (1953), Cmd. 8742. Cheng speaks of the clause as 'purely declaratory' of customary international law in *The Law of International Air Transport* (1962), p. 120, but that fact must be established by evidence of the law extrinsic to the treaty. He points out elsewhere that a series of multilateral treaties, such as the Paris Convention of 1919, the Havana Convention of 1928, and the Madrid Convention of 1926, and municipal legislation had made the rule so widely accepted that 'it seems safe to conclude that it is well recognised by States as part of international customary law'. 'Recent Developments in Air Law', *Current Legal Problems*, 9 (1956), p. 208 at p. 209.

by customary law; the adherence of many States to the Convention serves only to strengthen and confirm that rule.

However, when a tribunal associates a provision of a treaty with general international law, it does not always make plain in what sense the treaty operates as evidence of what went before or what emerged thereafter. This ambiguity is inherent in the views of the International Military Tribunal at Nuremberg on the effect of the Kellogg–Briand Pact.¹ Germany, whose nationals stood accused of the preparation and waging of a war of aggression and a war in violation of international treaties, was a party to the Pact,² and a discussion of the Pact as part of customary international law was not strictly necessary. Nevertheless, the Tribunal embarked on an analysis of the origins of the renunciation by States of war ‘as an instrument of national policy in their relations to one another’ that looked to the ways in which customary international law is formed and to the evidence that international law forbade aggressive war prior to the Kellogg–Briand Pact.³ A series of multilateral instruments concluded *prior* to the Pact led the Tribunal to conclude that ‘the prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred’.⁴ It is not necessary here to consider the accuracy of the conclusion reached. What is significant is that the Pact was put in the category of those treaties that ‘in many cases . . . do no more than express and define for more accurate reference the principles of law already existing’.⁵ The various multilateral treaties concluded before the Kellogg–Briand Pact were of consequence as harbingers of the emergence of a new rule of customary law reduced to written form in the Pact itself.

What is left unclear by the Judgment is the meaning of ‘already existing’—‘already’ at the time of the conclusion of the Kellogg–Briand Pact or ‘already’ when Germany resorted to war in violation of the Pact?⁶ If the Tribunal were following the first course, it was incumbent upon it to prove that the Pact did indeed reflect customary international law, in the absence of any internal evidence in the treaty that it did so. But if the state of customary international law in 1928 had been proven, it would not have been necessary to rely on the Pact, except by way of establishing

¹ International Treaty for the Renunciation of War as an Instrument of National Policy, signed at Paris, 27 August 1928, *United Kingdom Treaty Series*, No. 29 (1929), Cmd. 3410.

² By which sixty-two other nations were bound at the outbreak of war in 1939.

³ *Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg* (1946), Cmd. 6964, pp. 38–41.

⁴ *Ibid.*, at p. 41.

⁵ *Ibid.*, at p. 40.

⁶ The latter appears to be the view of Brownlie, who looks to practice following the Kellogg–Briand Pact and concludes: ‘The Kellogg–Briand Pact and the Saavedra Lamas Pact together with numerous statements in diplomatic correspondence and the instruments relating to non-recognition constitute “evidence of a general practice accepted as law”.’ *International Law and the Use of Force by States* (1963), p. 110.

its confirmation of, and consistency with the rule of customary international law. If acceptance by States had, under the second possibility, caused the Pact to pass into customary international law by the outbreak of the Second World War, it would similarly have been proper to have proved the state of customary international law at that time. Either employment of the Pact thus required proof of customary international law dehors the treaty and that proof would have made the evidence furnished by the Pact merely cumulative. But even if the Tribunal was unsatisfactory on this point, the very fact that it has declared that the Pact is evidence of customary international law gives that proposition all the force commanded by a pronouncement of an international tribunal, whether right or wrong.

Several categories of multilateral treaties must now be considered in the light of these preliminary observations.

II. HUMANITARIAN TREATIES

The application of Convention No. IV of The Hague concerning the Laws and Customs of War on Land¹ is excluded, even as between parties to the treaty in time of war, if one of the belligerents is not a party to the Convention.² It was contended on behalf of the defendants charged with conventional war crimes in the Nuremberg proceedings that the Convention, incorporating detailed provisions regarding the conduct of warfare, bound neither Germany nor persons acting on behalf of that State, since several of the parties to the conflict were not parties to Convention No. IV, and the *si omnes* provision therefore excluded the application of the treaty altogether. To this contention, grounded in a literal and restrictive reading of the treaty, the International Military Tribunal replied:

‘The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt to “revise the general laws and customs of war,” which is thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which were referred to in Article 6 (b) of the Charter.’³

¹ Signed at The Hague, 18 October 1907, *United Kingdom Treaty Series*, No. 9 (1910), Cmd. 5030.

² Article 2.

³ *Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg* (1946), Cmd. 6964, p. 65. A similar but not identical line was taken by the International Military Tribunal for the Far East, which held that ‘the [Hague] Convention [of 1907] remains as good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation’. *Judgment* (1948), p. 491, *Annual Digest*, 1948, p. 356 at p. 366. This is to say that the Convention is one guide to the law, rather than, as asserted at Nuremberg, the law applying to the situation, integrated as completely as if the Convention itself applied by its own terms.

Although the evidence is by no means clear,¹ the Preamble of Convention No. IV of 1907 indicates that the signatories were under the impression that they were creating new law. They thought it 'important . . . to *revise* the general laws and customs of war, with the view on the one hand of defining them with greater precision, and, on the other hand, of confining them within limits intended to mitigate their severity as far as possible'. Until 'a more complete code of the law of war' could be drawn up, they desired 'to conclude a *fresh* Convention'.²

A like defence was raised and similarly rejected in the subsequent proceedings against von Leeb and others.³ On this occasion the indictment had also charged violations of the Geneva Convention of 1929 relative to the Treatment of Prisoners of War,⁴ but the tribunal found that only certain provisions of the Convention but not others were 'clearly an expression of the accepted views of civilized nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia'.⁵ This was not simply a case in which the *si omnes* provision excluded the operation of the treaty as between parties but one in which one of the belligerents, Russia, was not a party to a treaty that actually contained no *si omnes* clause.

The nineteen paragraphs of the 1929 Convention that were found to be declaratory of customary international law were listed by the Tribunal. For example, the clause of Article 7 which provides that 'prisoners of war shall be evacuated within the shortest possible period after their capture, to depots located in a region far enough from the zone of combat for them to be out of danger' was included but not the requirement of the same Article that 'prisoners shall not be needlessly exposed to danger while awaiting their evacuation from the combat zone'. So likewise customary international law requires the provision of food but not of facilities for the preparation of such additional foodstuffs as the prisoners of war may have;

¹ Garner states, for example, that 'the great majority of the provisions of these [Hague] Conventions [of 1907]' were 'of course binding independently of the status of the conventions of which they were a part', because the draftsmen 'confined their efforts to defining and stating in precise rules the established usages and the best practice of the past'. *International Law and the World War* (1920), vol. 1, pp. 20-1.

² Italics supplied.

³ *U.S. v. von Leeb et al.* ['The High Command case'] (1948), *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 11 (1950), p. 462 at pp. 535-8; accord, *U.S. v. Krupp et al.* (1948), *ibid.*, vol. 9 (1950), p. 1327 at p. 1340.

⁴ Signed at Geneva, 27 July 1929, *United Kingdom Treaty Series*, No. 37 (1931), Cmd. 3941.

⁵ At p. 535. The Tribunal relied (at pp. 533-4) on the rejection by the International Military Tribunal for the Trial of German Major War Criminals of the defence raised to the charge concerning the mistreatment and murder of Soviet prisoners of war that the U.S.S.R. was not a party to the Geneva Prisoners of War Convention. In so doing it took account of the protest of Admiral Canaris against the regulations concerning the treatment of Russian prisoners: 'The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the U.S.S.R. Therefore, only the principles of general international law on the treatment of prisoners of war apply.'

potable water, but not tobacco;¹ and it prohibits unhealthful or dangerous work but does not require that wages be paid for work done.²

A rough-and-ready distinction may be discerned between those safeguards that are essential to the survival of the prisoner, on the one hand, and those protections that are not basic or which give depth to or implement the essential principles, but that line is not rigorously adhered to, and a number of safeguards not listed as having passed into customary law impress the observer as being of some consequence. The Tribunal gives no enlightenment on the source of its basic principles, which go well beyond the requirements of the Regulations Annexed to Convention No. IV of The Hague.

The views of the Tribunal in the *von Leeb* case are more extreme than those of the International Military Tribunal in the principal Nuremberg proceedings. In the latter case the Tribunal may be considered to have done no more than to deny the continuing force of the *si omnes* provision as to admitted parties to Convention No. IV of The Hague after a third of a century in the life of that agreement. But in *von Leeb* a convention in force for barely a decade was found to have passed into customary law in such a way as, in principle at least, to bind even non-parties to the instrument. Moreover, if the provisions of the Geneva Conventions that were invoked by the Tribunal had been no more than echoes of corresponding provisions of the Hague Regulations, the law of the *von Leeb* case would not have been an advance over that of Nuremberg. The fact was that those clauses of the 1929 treaty that were declared to reflect customary law went far beyond the somewhat primitive provisions of the Hague Regulations dealing with prisoners of war.

None of the war crimes tribunals stated why one or the other of the Conventions had become declaratory of customary international law. Proof might have been found in the doctrine, particularly as enunciated by 'the most eminent publicists' of countries that were not parties to the conventions, although the force of such writings as evidence of customary international law may be impaired by their sometimes indiscriminating description of treaties to which some but not all States are parties. More

¹ Article 11.

² Articles 32 and 34. It is of course true that Germany was already bound by the Geneva Prisoners of War Convention and was, in the view of the Tribunal, obliged to do no more than to extend the application of certain provisions of the Convention to the forces of a non-party. If the Tribunal had called for the application of the Convention in its entirety, it might have been possible to justify the result reached simply on the ground that the time had come for parties to the Convention to apply the treaty to non-parties (notwithstanding Article 82, which makes the Convention 'binding as between the belligerents who are parties thereto'), with the implication that a non-party might not be under the same obligation as a party. But the selection of certain basic humanitarian provisions of the Convention as declaratory of international law, leaving the rest to be applied only *inter partes* on condition of reciprocity, destroys any possible foundation for that line of argument.

telling evidence might have been provided by the State practice of non-parties or by the military manuals of non-parties¹ which incorporated the Hague or Geneva rules even though the countries concerned were not bound by them *qua* treaties. But such an exercise would be self-defeating if its only purpose was to be the demonstration of the state of customary international law dehors the treaty, for if that law could once be established, the necessity of reliance on the treaty would largely vanish. The burden is not eased by a court's declaration, as was true in the judgment of the International Military Tribunal for the Far East, that the treaty is one source of evidence of international law 'to be considered by the Tribunal along with all other available evidence'.² That statement, although superficially more plausible, leaves unresolved the question of how much weight can be attached to the treaty. If the treaty were in derogation of the customary law of nations, its weight would be wholly negative in establishing the state of customary international law.

There has been a similar problem about the impact of the Geneva Gas Protocol of 1925³ upon non-parties. The stated purpose of that instrument was that the prohibition of the use of gas and bacteriological warfare already incorporated in 'Treaties to which the majority of Powers of the world are Parties' should be 'universally accepted as a part of International Law, binding alike the conscience and the practice of nations'.⁴ The United States signed the instrument but did not ratify it. Those who maintain that that country is under a legal duty not to employ such modes of warfare find it necessary to demonstrate that the obligation derives not from the Protocol but from other treaties to which the United States is a party, from customary international law, and from conduct of the United States which is asserted to evince an awareness of an obligation incumbent upon it.⁵

The very aims of the Geneva Protocol were to facilitate the assumption of a conventional obligation by those States not already parties to treaties

¹ Notwithstanding the assertion in *U.S. v. List et al.* ['The Hostage case'] (1948), *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. 11 (1950), p. 1230 at p. 1237, that '... army regulations are not a competent source of international law. . . . They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilized nations generally.' In that case the matter at issue was whether the provisions of the British and American military manuals making superior orders an absolute defence accurately reflected the law. The Tribunal found that they set forth a 'decidedly minority view' and were therefore not to be followed. It conceded that it is possible that 'such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value'.

² *Judgment of the International Military Tribunal for the Far East* (1948), p. 491; *Annual Digest*, 1948, p. 356 at p. 366.

³ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, signed at Geneva, 17 June 1925, *United Kingdom Treaty Series*, No. 24 (1930), Cmd. 3604; *League of Nations Treaty Series*, vol. 94, p. 65.

⁴ Preamble.

⁵ Meyrowitz, 'Les armes psychochimiques et le droit international', *Annuaire français de droit international*, 10 (1964), p. 81 at pp. 101-15.

prohibiting chemical warfare and to ensure that bacteriological warfare, theretofore reprehended only by analogy to gas warfare, should fall under an express prohibition.¹ The parties were to 'exert every effort' to induce other States to accede. Great Britain, the Soviet Union and a number of other important States made reservations to the effect that the Protocol would be binding only with respect to other parties and would not be binding if another State's armed forces or the forces of its allies failed to respect its prohibitions.² The reservations are persuasive evidence that a number of the parties did not initially regard the Protocol as declaratory of a rule of customary international law placing an unqualified obligation upon all States to refrain from the use of such methods of warfare. It is thus incumbent upon any nation charging a non-party to the Protocol with an unlawful use of chemical or bacteriological warfare to prove by other evidence of customary international law, such as State practice, that the Protocol has gained general acceptance notwithstanding the failure of many States to accede to it.³

The one humanitarian treaty that carries internal evidence that it was intended to declare existing customary law—rather than, as in the case of the treaties heretofore referred to, to lay down new law—is the Genocide Convention.⁴ The first article of this treaty 'confirms that genocide, whether

¹ In 1952 the Soviet Union submitted to the Security Council a draft resolution (U.N.Doc. S/2663), appealing to States to ratify or accede to the Geneva Protocol of 1925 'for the prohibition of the use of bacteriological weapons'. It was not maintained that the prohibition had already passed into customary international law. The resolution was defeated on 26 June 1952, with only one vote in favour (the U.S.S.R.) and ten abstentions, *S.C.O.R.*, 7th year, 583rd meeting (S/PV, 583) (1952), p. 2. The principal reasons for opposition to the proposed resolution were the futility of paper promises and the view that the matter might better be dealt with in the context of disarmament.

When in 1966 the General Assembly called for 'strict observance by all States of the principles and objectives of the [Geneva] Protocol', it made it clear that the resolution did not itself impose a duty of compliance. A second paragraph of the resolution invited 'all States to accede to the Geneva Protocol', G.A. Resolution 2162 B (XXI), 5 December 1966 (A/RES/2162 (XXI)), (1966).

² *League of Nations Treaty Series*, vol. 94, p. 67, n. 1.

³ For differing views of the illegality of chemical and bacteriological warfare, see Kunz, *Gaskrieg und Völkerrecht* (1927); Overweg, *Die chemische Waffe und das Völkerrecht* (1937); van Eysinga, 'La guerre chimique et le mouvement pour sa répression', *Recueil des cours*, 16 (1927), p. 329; O'Brien, 'Biological-Chemical Warfare and the International Law of War', *Georgetown Law Journal*, 51 (1962), p. 1; Kelly, 'Gas Warfare in International Law', *Military Law Review*, 9 (1960), p. 1; Meyrowitz, loc. cit., (above p. 283, n. 5).

The conclusion of Stone on the transformation of treaty norms regarding the use of chemical weapons into rules of customary law is so guarded as to give little guidance to those desirous of complying with international law: '... Much can now be said for the view that the accumulation of preambulatory declarations, imperfectly operative provisions, to which most (but not all) the military Powers are parties, supported by analogies of customary law, and appeals to principles of humanity, has now rendered the prohibition of the use of all poisonous, asphyxiating or other gases legally binding upon practically all States.' *Legal Controls of International Conflict* (2nd impr., revised, 1959), p. 556.

⁴ Convention on the Prevention and Punishment of Genocide, signed at Paris, 9 December 1948, *British and Foreign State Papers*, vol. 151 (1948-II), p. 682; *United Nations Treaty Series*, vol. 78, p. 277.

committed in time of peace or in time of war, is a crime under international law' which the parties agree 'to prevent and to punish'. Its force as evidence of customary law is enhanced by the reference in the preamble to the resolution of the General Assembly, unanimously adopted, to the same effect.¹ The articles² following immediately after the first spell out in greater detail the elements of the offence and, although the matter is not free from doubt, may be taken as an authoritative interpretation of the general norm laid out in the preamble and in Article I. A third group of articles establish the machinery for the seeking out and punishment of those guilty of the crime.³ Even States, such as the United States, that are not parties to the Genocide Convention are thus under a duty not to commit genocide, and the Convention itself may be used as evidence of that obligation and, to a degree, of the content of the obligation. The latter comes by way of an interpretation by the signatories of the essential elements of the offence, theretofore defined only in general terms. The third group of articles in the Convention create wholly conventional rights and duties binding only on the parties.

Since the Geneva Conventions for the Protection of War Victims of 1949⁴ represent an advance over customary international law as restated in the Hague Regulations and in certain provisions of the Geneva Prisoners of War Convention of 1929, they could not at the outset have been regarded as declaratory of a body of customary law binding upon parties and non-parties alike. One hundred and eighteen States, a number somewhat inflated by the presence of the competing governments of divided States, were, by the end of 1965, regarded as parties to the Conventions.⁵ The existence of reservations to many articles⁶ makes this superficial unanimity less persuasive than it might otherwise be and points, as to a number of articles, to a diversity of opinion that gives ground for doubt about the full implementation of the Conventions, even amongst parties thereto. It would be paradoxical in the extreme if a non-party were to be regarded as bound unqualifiedly by the obligations of the Conventions, while a party might limit its duties by the entry of reservations.

The adherence of the great majority of the nations of the world might be taken as having established standards which even non-parties would be required to observe only if the international community were prepared to accept the existence of true international legislation. For the contention that a treaty becomes binding upon all nations when a great majority of the

¹ G.A. Resolution 96 (I), 11 December 1946, *G.A.O.R.*, 1st Session, 2nd part, Resolutions (A/64/Add. 1) (1947), p. 188.

² Articles 2-4.

³ Articles 5-9.

⁴ Signed at Geneva, 12 August 1949, *United Kingdom Treaty Series*, No. 39 (1958), Cmd. 550.

⁵ International Committee of the Red Cross, *Annual Report*, 1965 (1966), p. 53.

⁶ Notably to Articles 10, 12 and 85 of the Prisoners of War Convention.

world has expressly accepted it would suggest that a certain point is reached at which the will of non-parties to the treaty is overborne by the expression of a standard or an obligation to which the majority of States subscribe. The untenability of that view is quite clear in the case of treaties establishing the basic law of an international organization or laying down detailed rules concerning such matters as copyrights or customs duties or international commercial arbitration. In the former case, the necessity of making room for new parties by way of establishing, among other things, their voting power and financial obligations, and in the latter the element of bargaining militate against the extension of the benefits of the treaty to States other than those willing to accept its obligations. Treaties of an essentially humanitarian character might be thought to be distinguishable by reason of their laying down restraints on conduct that would otherwise be anarchical. In so far as they are directed to the protection of human rights, rather than to the interests of States, they have a wider claim to application than treaties concerned, for example, with the purely political and economic interests of States.¹ The passage of humanitarian treaties into customary international law might further be justified on the ground that each new wave of such treaties builds upon the past conventions, so that each detailed rule of the Geneva Conventions for the Protection of War Victims is nothing more than an implementation of a more general standard already laid down in an earlier convention, such as the Regulations annexed to Convention No. IV of The Hague. These observations, however, are directed to a distinction which *might* be made but which is not yet reflected in State practice or in other sources of the positive law.

III. CODIFICATION TREATIES

In theory a codification treaty purporting to state customary international law as it exists at the time of the adoption of the treaty is, if it secures the assent of a substantial number of States, powerful evidence of the state of customary international law. In this respect it deploys its effect upon non-parties to the treaty. It does so because it constitutes a clear and contemporary statement of the State practice of a substantial number of States and is therefore relatively much better evidence than the fragmentary, inconsistent and temporally varied manifestations of State practice which can ordinarily be adduced.

¹ In speaking of the 'purely humanitarian and civilizing purpose' of the Genocide Convention, the International Court of Justice stated: 'In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.' *Advisory Opinion on Reservations to the Genocide Convention*, I.C.J. Reports, 1951, p. 15 at p. 23.

A treaty or a provision of a treaty may normally¹ be demonstrated to declare existing customary international law in one of the four following ways.

(a). The treaty may state, generally in its preamble, that it is declaratory of customary international law.

(b). The final act of the conference that drew up the treaty or the *travaux préparatoires* of the treaty may indicate that the entire treaty was intended by its draftsmen to be declaratory of customary international law.

(c). The *travaux préparatoires* for a particular article may show that the article was intended to be declaratory of customary international law, even though other provisions of the treaty were not.

(d). A comparison of the terms of a particular article with the state of customary international law may indicate that the article is an accurate formulation of a rule of customary international law.²

It is only exceptionally that a so-called 'codification treaty' concluded under United Nations auspices on the basis of a draft prepared by the International Law Commission asserts on its face that it codifies existing international law. The four Geneva Conventions on the Law of the Sea of 1958³ were drafted in pursuance of the responsibilities of the General Assembly for the 'progressive development of international law and its codification'.⁴ The mandate given to the Diplomatic Conference of Geneva of 1958 by the General Assembly was 'to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem' and to embody the result in a treaty or treaties.⁵ The reference to 'technical, biological, economic and political aspects of the problem' suggests that something more than mere codification was involved. That impression is borne out by the assertion of the International Law Commission itself that it had abandoned the attempt to

¹ Normally, because other theoretical possibilities exist (e.g. that the preamble of a treaty might indicate that a particular article is declaratory of international law) but would probably not occur in practice.

² It follows that if proof cannot be adduced in one of these ways, the treaty cannot be taken as evidence of customary international law as it existed at the time of the adoption of the treaty. As the Permanent Court stated in *The S.S. 'Lotus'*: 'Finally, as regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law rather than as corresponding to the extraordinary jurisdiction which these conventions confer on the state-owned ships of a particular country in respect of ships of another country on the high seas.' *P.C.I.J.*, Series A, No. 10, p. 27.

³ Convention on the High Seas, *United Kingdom Treaty Series*, No. 5 (1963), Cmnd. 1929, *United Nations Treaty Series*, vol. 450, p. 82; Convention on the Continental Shelf, *United Kingdom Treaty Series*, No. 39 (1964), Cmnd. 2422; Convention on the Territorial Sea and the Contiguous Zone, *ibid.*, No. 3 (1965), Cmnd. 2511; Convention on Fishing and Conservation of the Living Resources of the High Seas, *ibid.*, No. 39 (1966), Cmnd. 3028.

⁴ United Nations Charter, Article 13, paragraph 1a.

⁵ G.A. Resolution 1105 (XI), 21 February 1957, *G.A.O.R.*, 11th Session, Supplement No. 17 (A/3572) (1957), p. 54.

specify which articles constituted 'codification' and which 'progressive development'.¹ As the drafts went to the Conference, they departed from customary international law, but specifically wherein they departed from that law the Commission had not indicated.

However, one of the Conventions on the Law of the Sea prepared by the Conference, the Convention on the High Seas, referred expressly to the codification of international law. The Preamble contains two clauses not found in the other conventions:

'*Desiring* to codify the rules of international law relating to the high seas,

'*Recognizing* that the United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958, adopted the following provisions as generally declaratory of established principles of international law . . .'

Is one to conclude from the difference in the language of the preambles that only one treaty is declaratory of international law and that the others make no claim to reflect the customary law? The circumstance that other provisions of the Conventions were drafted in such a way as to make their language uniform and consistent leads one to think that the different language of the preambles was intentionally adopted and that the Convention on the High Seas must therefore be taken *presumptively* to be declaratory of customary international law.

The record of the negotiating history is silent or negative in the case of other products of the International Law Commission. Although its work on diplomatic relations was referred to as 'codification'² and the resolution convening the Vienna Conference of 1961³ spoke of the 'codification' of the law, the term was apparently not used in its technical sense and did not exclude progressive development of the law. In the case of the Convention on Consular Relations, the Commission asserted that the draft submitted to the General Assembly constituted both codification and progressive development.⁴ The final acts of the two conferences and the preambles of the two Vienna Conventions on Diplomatic Relations⁵ and Consular Relations⁶ say nothing of their relationship to customary international law, save to declare that that law will continue to govern matters not dealt with by the Conventions. And when the Draft Articles on the Law of Treaties

¹ Report of the International Law Commission covering the work of its eighth session, 1956, *I.L.C. Yearbook* (1956-II), p. 253 at pp. 255-6.

² G.A. Resolution 685 (VII), 5 December 1952, *G.A.O.R.*, 7th Session, Supplement No. 20 (A/2361) (1953), p. 62.

³ G.A. Resolution 1450 (XIV), 7 December 1959, *ibid.*, 14th Session, Supplement No. 16 (A/4354) (1960), p. 55.

⁴ Report of the International Law Commission covering the work of its twelfth session, 1960, *I.L.C. Yearbook* (1960-II), p. 143 at pp. 145-6.

⁵ Signed at Vienna, 18 April 1961, *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. 2 (A/CONF. 20/14/Add. 1) (1962), p. 81.

⁶ Signed at Vienna, 24 April 1963, *Official Records of the United Nations Conference on Consular Relations*, vol. 2 (A/CONF. 25/16/Add. 1) (1963), p. 175.

were submitted to the General Assembly, the report of the Commission expressly stated:

'The Commission's work on the law of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute, and, as was the case with several previous drafts, it is not practicable to determine into which category each provision falls. Some of the commentaries, however, indicate that certain new rules are being proposed for the consideration of the General Assembly and of Governments.'¹

But even in the case of a treaty which speaks of codifying customary international law, there may be internal evidence that it is not in every respect declaratory of customary international law. For example, Article 11 of the Geneva Convention on the High Seas, confining to the State of the flag jurisdiction to take penal or disciplinary proceedings in the event of a collision at sea, was intended to undo the mischief of the much criticized *Lotus* case² and to make general international law consistent with a multi-lateral treaty, the Brussels Convention of 1952.³ If the *Lotus* case, decided though it was by the casting vote of the President of the Permanent Court, established the state of customary international law, the effect of raising the incompatible formula of the Brussels Convention to the level of general international law was certainly not to codify the law but to change it. It had not been understood prior to 1958 that customary international law required 'the establishment and maintenance of an adequate and effective search and rescue service' by coastal States, as was now demanded by Article 12 of the Convention. Nor was the duty imposed on States by the Convention to take measures to prevent the pollution of the sea by radioactive waste a mere reflection of existing customary law, except by deduction from some brooding general principle of international law. And finally the transplantation of the notion of 'genuine link' from the law relating to the diplomatic protection of individuals⁴ to the law concerning the flag of vessels⁵ constituted a justly criticized change in the law. The problem is not solved by asserting that these changes in the law constituted that 'progressive development' which is inseparable from 'codification'. To the extent that the codifier progressively develops the law, his text ceases to be

¹ Reports of the International Law Commission covering the work of the second part of its seventeenth session and on the work of its eighteenth session, 1966, *G.A.O.R.*, 21st Session, Supplement No. 9 (A/6309/Rev. 1) (1966), p. 10; *American Journal of International Law*, 61 (1967), p. 248 at p. 262.

The resolution of the General Assembly calling for the convening of an International Conference of Plenipotentiaries on the Law of Treaties spoke of the progressive development and codification of the law on the subject. G.A. Resolution 2166 (XXI), 5 December 1966 (A/RES/2166 (XXI)) (1966).

² *P.C.I.J.*, Series A, No. 10.

³ International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, signed at Brussels, 10 May 1952, *United Kingdom Treaty Series*, No. 47 (1960), Cmnd. 1128. *United Nations Treaty Series*, vol. 439, p. 233.

⁴ *Nottebohm case (Liechtenstein v. Guatemala)*, *I.C.J. Reports*, 1955, p. 4.

⁵ Geneva Convention on the High Seas, Article 11.

'declaratory of established principles of international law', as claimed by the Preamble of the Convention on the High Seas. This is more than a criticism of the accuracy of the language of the Preamble, for the significance of the Convention as restating old law or creating new law derives from the intent of the draftsmen. The language of the Preamble in this case furnishes the best evidence of that intent.

Is each case of demonstrated incompatibility between customary international law and the formula of the Convention the thirteenth stroke of a crazy clock, casting doubt on every other provision? If the Convention is inaccurate in one respect, it is at least theoretically conceivable that it is inaccurate in other respects or in all respects. If the accuracy of the preambulatory statement is called in question, then it is possible that the treaty can no longer in its generality be used as evidence of customary international law. The words 'generally declaratory' do not help, for they cast on the interpreter of the treaty the obligation of determining which provisions are declaratory and which are not. The making of that distinction requires an examination of the state of customary international law, which was the very fact to be proven by reference to the Convention.

If a treaty that purports to be declaratory of international law is to be taken at its face value and if great weight is to be given to such a treaty as an expression of State practice in determining the state of customary international law, it is conceivable that the draftsmen of treaties will attempt to disguise a change in the law as a mere expression of existing law. The inclusion of self-serving words of declaration will give the treaty an influence in customary international law that it would lack if these words were not inserted. To these possibilities of abuse must be added the problem of ambiguity, resulting from imprecision on the part of the draftsmen, about whether the treaty does purport to reflect the customary law. In the latter event, the question of interpretation must be solved before it is possible to move on to the question of whether the draftsmen were accurate in what has now been determined to be intended as an expression of existing law.

If, as seems to be the case, it would be unwise to give conclusive effect as evidence of the law to the purportedly declaratory treaty, it is still not necessary to swing to the opposite extreme by confining the effect of the treaty wholly to its actual parties. A suitable middle course would be to give presumptive effect as evidence of customary law to the treaty purporting to declare that law while allowing the State or individual against whom the treaty is proffered the right to demonstrate that the particular treaty provision invoked does not correctly express the law. If the objecting party fails to sustain that burden, the presumption created by the treaty is not overcome and the treaty retains its force as an extremely authoritative expression of the law as it exists independently of the treaty. The burden of

overcoming the presumption created by the treaty is the more easily discharged if the treaty purports to be only 'generally declaratory' of customary law, for the treaty itself speaks somewhat indecisively. Correspondingly, the burden is more difficult to discharge if the treaty states firmly and unequivocally that it codifies the customary law and yet more difficult if it also recites the evidence, as in the case of the Genocide Convention, on which the assertion in the treaty is based.

Except in the case of the Geneva Convention on the High Seas, the preponderance of the evidence is thus weighted against the 'codification' conventions concluded under United Nations auspices being declaratory of customary international law. As some of their provisions codify and others progressively develop—that is to say, change—the law, they do not fall in either of the first two of the four classes mentioned at the beginning of this section. It may be possible through an examination of the *travaux préparatoires* to demonstrate that a particular article was intended to be declaratory of customary law but this will be possible only in those exceptional cases in which the path was well marked and clear. The laying of a proper foundation for the use of the article may prove to be so burdensome and so much a side issue that the advocate or decision-maker will hesitate to follow that course. And finally, as has been observed before, if the article in question is to be proved declaratory of customary international law by way of showing the state of customary international law in the absence of a treaty, the value of the treaty lies only in its confirmation of, or failure to depart from, the rule of customary international law.¹

Even though a codification treaty may not yet have entered into force, it nevertheless has a certain value as evidence of customary international law, provided that it purports to codify rather than progressively to develop or to change the law. For example, the Geneva Convention of 1958 on the High Seas² was freely invoked in the discussion of at least two episodes that took place before the Convention had entered into force between the States involved. One of these was the incident in 1959 in which a Russian trawler which was alleged to have been responsible for the cutting of a submarine cable was boarded and inspected by a party from a United States destroyer.³ The other was the more dramatic episode of the *Santa Maria*, a Portuguese liner which in January 1961 was taken over on the high seas by political opponents of the Portuguese régime, to the accompaniment of some disquiet on the part of the United States and several other nations

¹ See above, p. 278.

² Done at Geneva, 28 April 1958, *United Kingdom Treaty Series*, No. 5 (1963), Cmd. 1929, *United Nations Treaty Series*, vol. 450, p. 82.

³ Exchange of notes between the United States and the U.S.S.R., *Department of State Bulletin*, 40 (1959), pp. 555–8; commented upon in Franklin, *The Law of the Sea: Some Recent Developments*, (vol. 53 (1959–60), pp. 157–77 of the *International Law Studies* published by the Naval War College).

about the safety of their nationals.¹ In both cases, the commentators discussed the consistency of the action taken with the provisions of the High Seas Convention, which was not to enter into force until 30 September 1962. There can be little doubt that the legal memoranda prepared by the legal advisers of the governments concerned likewise paid deference to the Convention. Since the cable-cutting was regulated by a treaty of 1884 to which the Soviet Union and the United States were parties, minimal use had to be made of the 1958 Convention, but in the latter episode it was of considerable importance to determine whether the seizure of the *Santa Maria* constituted piracy within the meaning of Articles 14 to 22 of the High Seas Convention.

The newly concluded codification treaty (in the strict sense) that has not yet entered into force carries weight as a carefully worked out statement of existing customary law, even though it may not yet have drawn any ratifications or accessions. It derives its authority from the careful consideration that has been given to the text, from the fact that it has gained a certain degree of acceptance by those who participated in its drafting, and from the hope that States will in the fullness of time ratify or accede to it. If the drafts of the International Law Commission carry weight because they are the carefully considered and concerted views of a group of eminent publicists, how much more influential must be their drafts when, having been subjected to the scrutiny of States and having been adjusted to take account of the political demands of States, they emerge as draft treaties open to ratification and accession.²

It might also be contended that a treaty not yet in force may be employed as evidence of the State practice of the individual State that participated in the drawing up of the agreement and was willing to sign it. According to this view, a sort of estoppel might be created against the State that has signed but has not yet ratified the treaty whereby the State is precluded from denying that the treaty reflects an accurate statement of the customary international law by which it is willing to be bound. This is of course not estoppel in the technical sense, there being no representation of fact which has been relied upon by another State to its detriment.³

¹ Green, 'The *Santa Maria*: Rebels or Pirates', this *Year Book*, 37 (1961), p. 496; van Zwanenberg, 'Interference with Ships on the High Seas', *International and Comparative Law Quarterly*, 10 (1961), p. 785 at pp. 798-817; Váli, 'The *Santa Maria* Case', *Northwestern University Law Review*, 56 (1961), p. 168.

In reporting the case of the *Red Crusader*, a British fishing trawler arrested by Denmark in May 1961, Mr. Lauterpacht alluded to the relevance of Article 23 (1) of the High Seas Convention, concerning hot pursuit. *The Contemporary Practice of the United Kingdom in the Field of International Law* (1962), p. 50 at p. 51.

² Lauterpacht, 'Codification and Development of International Law', *American Journal of International Law*, 49 (1955), p. 16 at p. 39.

³ See Bowett, 'Estoppel before International Tribunals and its Relation to Acquiescence' this *Year Book*, 33 (1957), p. 176.

This view is subject to the objection that each statement of law in an unratified treaty may have been the result of political or legal compromises that were to be effective only if the treaty were to enter into force and only if the State concerned were to give its unequivocal consent through ratification. The doctrine of integration and the interdependence of treaty provisions may also mean that a State was willing to accept a given formula for one article only if it gained its way on another. The bargain, to the extent that compromise and adjustment were involved, is incorporated in the treaty as a whole, and single articles should not be signed out and turned against a particular State. A more accurate view of the attitude of the particular State might be gained from an examination of its voting record on individual articles and paragraphs, but even here a vote in favour of a particular provision does not necessarily reflect the State's attitude toward international law on that question.

These objections might be said to have equal force to the invocation of the treaty by a non-party against a signatory that *has* ratified, if the purpose of reference to the treaty is to establish that the signatory has conceded that such-and-such is the state of the law. The distinction between the two situations lies in the fact that it is only with ratification and with the entry into force of the agreement that the signatory firmly commits itself to the view of customary international law set forth in the treaty.¹ Until that time it merely indicates a tentative acquiescence in the view set forth in the treaty and is not precluded from adducing other possibly inconsistent evidence of customary international law to be weighed in the balance with the influential but hardly conclusive evidence furnished by the unratified treaty.

From the foregoing one may conclude that the codification treaty not yet in force plays a legitimate part in establishing the state of the law only early in its life. At that time it carries weight as an expression of the opinion and practice of nations in general, rather than of the legal practice or position of any one State signatory or party to it. With the passage of time its significance wanes until it vanishes altogether as States silently reject the treaty.²

¹ See Hurst, 'A Plea for the Codification of International Law on New Lines', *Transactions of the Grotius Society*, 32 (1946), p. 135 at p. 144.

² In the *Asylum* case (*Colombia v. Peru*), the International Court rejected as evidence of a local custom the two Montevideo Conventions of 1933 and 1939. The first had been ratified by only eleven States and the latter by only two, and Peru, against which the Conventions were invoked, had not ratified either. The Court said that the limited number of States that had become parties to the Convention made it impossible to use the treaties as 'proof of customary law'. *I.C.J. Reports*, 1950, p. 266 at p. 277; see Briggs, 'The Colombian-Peruvian Asylum Case and Proof of Customary International Law', *American Journal of International Law*, 45 (1951), p. 728.

Concerning the evidential value of failure to accept the provisions of a multilateral treaty, see *The Appam*, 243 U.S. 124 at 150-1 (1917).

IV. TREATIES CREATING NEW LAW

The Draft Articles on the Law of Treaties which the International Law Commission submitted to the General Assembly in 1966 included a provision making it clear that the stipulations dealing with treaties creating rights and duties for third States did not exclude the passage of a rule of conventional law into customary international law:

'Nothing in articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law.'¹

The commentary on the article refers to the phenomenon whereby 'other States recognize rules formulated in a treaty as binding customary law'. 'In short,' the Commission said, 'for these States the source of the binding force of the rules is custom, not the treaty.' Although the Commission alluded to codification treaties, the prevailing theme of the commentary is that treaties, including those codifying international law, may be constitutive of new customary law when their provisions have been recognized by other States as having passed into customary law.

The Regulations annexed to Convention No. IV of The Hague of 1907 and *semble* the Kellogg-Briand Pact have already been mentioned² as examples of treaties which initially laid down new law but which with the passage of time and general acceptance became sources of new customary law. However, these are not the only instances of this phenomenon.

The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws³ is perhaps the most often cited of the treaties that have passed into customary law. The drafters of the Convention refrained from saying that the treaty created new law,⁴ but there can be little doubt that the provisions regulating such matters as the nationality of married women and of children⁵ imposed on States obligations that had not existed prior to 1930. In the *Nottebohm* case⁶ the International Court of Justice invoked Articles 1 and 5 of the Convention as evidence of the applicable international law. Article 1 accepted the capacity of a State to

¹ Article 34, Reports of the International Law Commission covering the work of the second part of its seventeenth session and on the work of its eighteenth session, 1966, *G.A.O.R.*, 21st Session, Supplement No. 9 (A/6309/Rev. 1) (1966), p. 61, *American Journal of International Law*, 61 (1967), p. 248 at p. 375.

² See above, pp. 279-83.

³ Signed 12 April 1930, *United Kingdom Treaty Series*, No. 33 (1937), Cmd. 5553, *League of Nations Treaty Series*, vol. 179, p. 89.

⁴ Article 18 states: 'The inclusion of the above-mentioned principles and rules in the convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law.' See Flournoy, 'Nationality Convention, Protocols and Recommendations Adopted by the First Conference on the Codification of International Law', *American Journal of International Law*, 24 (1930), p. 467 at p. 468.

⁵ Chapters III and IV.

⁶ (*Liechtenstein v. Guatemala*), *I.C.J. Reports*, 1955, p. 4 at pp. 22 and 23.

determine who are its nationals but made recognition of this determination by other States conditional on the consistency of the determination with treaties, custom and general principles of law. Article 5 stipulated that in a third State 'a person having more than one nationality shall be treated as if he had only one' and established the criteria for that determination. Prior to 1930, and indeed until the decision in *Nottebohm*, the propositions asserted in Article 5 had not been free from doubt.

Since Guatemala and Liechtenstein were not parties to the Hague Convention of 1930, the treaty must have been employed as evidence of general international law. In subsequent proceedings both international¹ and municipal² tribunals have, without regard to the fact that the States involved were not parties to the treaty, relied on the Convention, particularly on Article 5. That use of the treaty could only have come as the result of the conviction that it had come to reflect the state of customary international law.

As in the case of the creation of other rules of customary international law, special conditions, both legal and extra-legal, have facilitated the transition from treaty to customary international law. In the case of double nationality it has been the need to sort out national ties and to bring the concept of nationality into closer relationship with the realities of an individual's factual ties with one country or another. The passage into customary law of the prohibition of privateering found in the Declaration of Paris of 30 March 1856³ has been eased by the fact that this mode of warfare has become technologically obsolete, as the converted merchantman, armed for offensive purposes and acting under private control, has vanished from the seas.⁴ Moreover, the abolition of this mode of warfare was

¹ *Mergé* claim (Italian-United States Conciliation Commission, 1955), I.L.R. 22 (1955), p. 443 at pp. 449-50, citing Articles 4 and 5 of the Convention; *Flegenheimer* claim (Italian-United States Conciliation Commission, 1958), I.L.R. 25 (1958-I), p. 91 at p. 149, citing Article 5 of the Convention. In *Mergé*, the Commission stated without more: 'The Hague Convention, although not ratified by all the Nations, expresses a *communis opinio juris*, by reason of the near unanimity with which the principles referring to dual nationality were accepted' (at p. 450).

² E.g. *Compulsory Acquisition of Nationality* case (Federal Republic of Germany, Court of Appeal of Cologne, 1960), I.L.R. 32 (1966), p. 166 at p. 167, citing Article 1.

³ Cited above, p. 278, n. 1.

⁴ Genet, *Précis de droit maritime pour le temps de guerre* (1938), vol. 1, p. 179. However, Genet looked upon the obligation to refrain from privateering as wholly conventional in nature and this provision of the Declaration as subject to denunciation by the signatories.

It must also be borne in mind that the Declaration of Paris was further implemented by Convention No. VII of The Hague Relative to the Conversion of Merchant Ships into Warships, signed 18 October 1907, *British and Foreign State Papers*, vol. 100 (1906-7), p. 377. Some such as Stone (*Legal Controls of International Conflict* (2nd impr., revised (1959), p. 576) and Tucker (*The Law of War and Neutrality at Sea*, in *International Law Studies*, vol. 50 (1957), pp. 40-1, published by the Naval War College) contend that Convention No. VII weakened the Declaration by allowing converted merchant ships to take the place of privateers. But it cannot be maintained that the Convention abrogated the provision of the Declaration concerning privateering, which looked to the use of private vessels under private control for private gain. See Oppenheim, *International Law*, vol. 2 (7th ed., Lauterpacht, 1952), p. 275. The fact that a contrary view was widely

dictated in part by humanitarian considerations calling for the maintenance of a clear distinction between warships and private merchant vessels¹—those same humanitarian considerations that played a part in making the Hague Regulations customary international law.

But, as in the case of the humanitarian treaties, the basis upon which a treaty laying down new law has passed into customary law is seldom illuminated. Both Liechtenstein and Guatemala cited the Hague Convention of 1930 on the Conflict of Nationality Laws to the International Court of Justice in the *Nottebohm* case² and the Court, without more, cited the Convention in its judgment. After this recognition of the force of the Convention by the highest international tribunal, the Italian–United States Conciliation Commission³ may be pardoned for simply accepting the value of the treaty, to which neither Italy nor the United States was a party. In a system in which precedent does have some value, it was appropriate to defer to the views of the International Court, even though they might be open to criticism. The very assertion of the International Court that Articles 1 and 5 of the Convention had passed into customary international law *did* make them pass into customary international law.

The appropriate course—a course that may have been followed by the International Court in its private deliberations—would have been to examine the reception of the Hague Convention of 1930 into State practice. It would, for example, have been legitimate to look to the nationality statutes of non-parties⁴ to the Convention to determine whether they responded to some imperative of the treaty.⁵ Alternatively one might have expected that there would have been some regard to the ‘writings of the most eminent publicists’ if these are to be thought to have some value, independently of their reflection of State practice, as evidence of the state of general international law.

In principle he who maintains that the law created by a treaty has passed into customary international law has the burden of demonstrating that the norms of the treaty have been accepted and applied in the relations of States. He must thus adduce evidence of the practice of States from the entertained prior to the First World War casts doubt on the passage of the Declaration into customary international law prior to that conflict.

¹ Hall, *The Law of Naval Warfare* (2nd ed., 1921), p. 57; McDougal and Feliciano, *Law and Minimum World Public Order* (1961), p. 562.

² Both Liechtenstein and Guatemala had alluded to the Convention in their memorials but had not drawn the attention of the Court to the fact they were not parties to the treaty. *I.C.J. Pleadings*, 1955, vol. 1, pp. 36–7 and p. 188.

³ *Mergé and Flegenheimer* claims, cited above, p. 295, n. 1.

⁴ The statutes of parties would not have been significant, since the States concerned would merely have been discharging conventional obligations created by the treaty.

⁵ Lauterpacht alludes in ‘Codification and Development of International Law’, *American Journal of International Law*, 49 (1955), p. 16 at p. 33, to the impetus given by the Convention ‘in particular with regard to nationality of married women, to radical legislative changes on matters previously described as forming unalterable and fundamental features of national systems of law’.

time of the adoption of the text of the convention, when it presumably began to exercise its influence, until the critical date of the litigation, dispute, or other occasion for the application of the law. This burden may be discharged in either of two ways: The first is to demonstrate that the treaty or a particular article thereof has been accepted by non-parties by express reference to the treaty or article—that is, through a sort of incorporation by reference into customary law. The other is to show the state of customary international law independently of the treaty and then that the rule of customary law is the same as that of the treaty. Even in the latter case, the proof of the law is somewhat simpler than in the absence of the treaty, for once the ground has been laid, one is entitled to rely on the black letter of the treaty. Even though the foundation may not be simple to lay, a structure of treaty law is more persuasive and authoritative than a structure constructed of the diverse and jumbled materials of State practice.

V. TREATIES AS EVIDENCE OF GENERAL PRINCIPLES OF LAW

Thus far the significance of multilateral treaties has lain in the light that they shed on 'international custom, as evidence of a general practice accepted as law'.¹ But a treaty may also be employed to establish the state of *ius gentium*, as evidence of 'the general principles of law accepted by civilized States'.

If it is necessary to fill out the imprecise norms of the Charter with respect to human rights, and to determine the content of those human rights which the members of the United Nations are to promote and encourage respect for,² it would be legitimate to look to the provisions of the European Convention on Human Rights,³ a treaty in force, or to draft treaties in the form of the two Human Rights Covenants approved by the General Assembly at its session in 1966.⁴ Particularly in the first instance, the treaty furnishes evidence of the common standard prevailing in the legal systems of the parties. But more than this, it indicates what standard as to the treatment of nationals a State has been willing to accept for *international* purposes. In this aspect, a treaty to which fifteen States are parties is more compelling evidence of an international standard than the

¹ Statute of the International Court of Justice, Article 38, paragraph 1.

² Charter, Article 1, paragraph 3.

³ European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, 4 November 1950, *United Kingdom Treaty Series*, No. 71 (1953), Cmd. 8969, *United Nations Treaty Series*, vol. 213, p. 221.

⁴ International Covenant on Economic, Social and Cultural Rights, and International Covenant on Civil and Political Rights, G.A. Resolution 2200 (XXI), 16 December 1966 (A/RES/2200 (XXI)) (1966).

municipal statutes and constitutional provisions that the same number of States are willing to apply for purely municipal purposes.

Occasions for the use of such treaties as evidence of *ius gentium* are limited by the fact that many tribunals already have available more precise legal standards belonging to the system of law that they routinely apply. A municipal court can normally be expected to look to the specific provisions of its own municipal law.¹ The United Nations Administrative Tribunal has likewise not been swayed by a litigant's appeal, not to a treaty, but to the Universal Declaration of Human Rights, since it had its own law, the individual's contract of service and the Staff Regulations, to guide it.² On the other hand, when a question about a nation's compliance with the Charter is in issue in an organ of the United Nations, it would seem appropriate to look to multilateral treaties on human rights in order to give some solid content to the general principles of the Charter.

VI. CONCLUSIONS

The foregoing analysis suggests these conclusions:

1. If reliance is to be placed on a multilateral treaty as evidence of customary international law, it is first necessary to establish whether the treaty was intended to be declaratory of existing customary international law or constitutive of new law. The silence of the treaty, which may necessitate resort to the *travaux préparatoires*, can make this a task of great difficulty.

2. If the treaty on its face purports to be declaratory of customary international law or if it can be established that such was the intent of its draftsmen, the treaty may be accepted as valid evidence of the state of customary international law. The weight it will carry varies in proportion to the number of parties and is also affected by the amount of consistent or inconsistent evidence of the state of customary international law available from other sources, such as judicial decisions or diplomatic correspondence.

If it can be established that a treaty that purports to be declaratory of international law actually lays down new law—a burden which must be sustained by the opponent of the proffered evidence—the impact of the treaty may be weakened. It nevertheless remains that if a State declares

¹ There have, however, been several instances in which municipal courts have referred to the European Convention even though it was not technically binding. In *State (Duggan) v. Tapley*, I.L.R. 18 (1951), p. 336, the Supreme Court of Eire cited the Convention in defence of the State, even though the treaty was not yet in force as to that country. And in *War Crimes (Preventive Murder) (Germany) case*, I.L.R. 32 (1966), p. 563, the Federal Supreme Court invoked Article 2 of the Convention, which was not technically binding on Germany in that case.

² *Khavkine v. Secretary-General of the United Nations*, Judgement No. 66 (1956), *Judgements of the United Nations Administrative Tribunal (1950-1957)* (AT/DEC. 1 to 70) (1958), p. 378, I.L.R. 23 (1956), p. 616.

that what is apparently new law is actually part of existing law, that very assertion counts in favour of the rule's incorporation into customary international law.

The clear formulation of rules in a codification treaty and the assent of a substantial number of States may have the effect of arresting change and flux in the state of customary international law. Although the treaty 'photographs' the state of the law as at the time of its entry into force as to individual States, it continues, so long as States remain parties to it, to speak in terms of the present. Thus the continued adhesion of a State to the Geneva Convention on the High Seas of 1958 will in 1968, in the absence of evidence to the contrary in the State practice of that nation, be a declaration that the state of customary law has remained as it was declared to be ten years before. What can change over the decade is the evidence dehors the treaty, which may have the effect of giving greater or less weight to the treaty relative to other evidence.

3. Early in the life of a treaty that is declaratory of customary law but has not yet entered into force, it carries weight as evidence of the state of the law. With the passage of time, its evidentiary force weakens. There still often remains a certain ambiguity about whether the lack of ratifications or accessions comes as the consequence of the fact that States disagree with the treaty or because the treaty has been so warmly received into customary international law that ratification of the treaty or accession to it would be supererogatory.

4. If a treaty was at the time of its adoption constitutive of new law, then the person or entity relying on the treaty as evidence of customary law has the burden of establishing that the treaty has subsequently been accepted into custom, either by express reference to this process by States and other authorities or by proof that the rule of the treaty is identical with customary law in the absence of the treaty. There are, as has been indicated,¹ problems in marshalling proof of this process, and if the state of customary law dehors the treaty can once be proven, it may be unnecessary to rely on the treaty. However, the clarity of the treaty text may make it a convenient point of reference, worth the complex process of proving its reception into customary international law. Humanitarian treaties may, by reason of their special character, be an exception to this general rule. The adhesion of the great majority of the important States of the world to such an agreement may act in such a way as to impose the standards of the treaty on non-parties. But that view, as has been pointed out,² requires acceptance of the notion that there is such a thing as true international legislation, by which the majority binds the dissenting or passive minority.

5. The advantage of the employment of a treaty as evidence of customary

¹ See above, pp. 296-7.

² See above, pp. 285-6.

international law, as it was at the time of the adoption of the treaty or as it has come to be, is that it provides a clear and uniform statement of the rule to which a number of States subscribe. There is no problem of reconciling ambiguous and inconsistent State practice of varying antiquity and varying authority. The treaty speaks with one voice as of one time.

6. The convenience of reliance on the multilateral treaty is such that it may have a certain centripetal force, whether the agreement was initially declaratory or constitutive of the law. Inertia may lead advocates or decision-makers to drop other evidence of the law and to defer to the treaty because it speaks loudly and clearly. Thus the four elements of statehood listed in the Montevideo Convention on the Rights and Duties of States¹ have become a standard expression of the definition of a State.

7. The passage of the rule of a treaty into customary international law may have certain consequences for the parties as well as non-parties. For example, if the treaty is accepted as a sound statement of customary international law, denunciation of the treaty by a party cannot absolve that State from its obligation to observe the rules of customary international law, proof of the existence of which is to be found in the treaty. Of course, the impact of the treaty as evidence of custom is proportionately reduced by the defection of the former party, just as any rule of customary law is affected by departures from it by individual States.

8. Reliance on a multilateral treaty as evidence of customary international law is not conditional on any demonstration that the signatory States have actually observed the norms of the treaty for any length of time. The process of establishing the state of customary international law is one of demonstrating what States consider to be the measure of their obligations. The actual conduct of States in their relations with other nations is only a subsidiary means whereby the rules which guide the conduct of States are ascertained. The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts.

¹ Signed 26 December 1933, Article 1, Hudson, *International Legislation*, vol. 6 (1937), p. 620.

KAUTILYAN PRINCIPLES AND THE LAW OF NATIONS*

By PROFESSOR C. H. ALEXANDROWICZ

INTRODUCTION

THE historian of the law of nations who intends to ascertain the totality of factors which contributed to the development of our system of international law cannot confine his inquiry to pre-nineteenth-century Europe only. The orthodox view expressed in some of our treatises that the present-day system of international law is exclusively a product of Christian civilization and had been established by the European Family of Nations only is not tenable in the light of historical reality.¹ This view ignores *inter alia* the significance of treaty and diplomatic relations between Europe and a number of Asian sovereigns² which accompanied the spectacular growth of East Indian trade during the sixteenth, seventeenth and eighteenth centuries.³ During that period trade between the two continents had become an important element in the development of European economy and there is no reason to doubt that all the agencies participating in this trade, i.e. the Portuguese and the Dutch, English and French East India Companies (endowed with delegated sovereign powers) on the one hand, and the East Indian sovereigns on the other, applied and generated in their mutual transactions legal principles and usages which ultimately became part and parcel of our generally accepted code of inter-State conduct. The influence exercised by the European agencies on the formulation of East Indian treaties or diplomatic transactions can be studied by an analysis of our classical treatises and the source material contained in European collections of treaties⁴ and other documents available in East India Company or other archives. It is, however, much more difficult to ascertain the impact of inter-sovereign usage as observed by East Indian rulers *inter se* on the formulation of treaties and transactions concluded with European entities, for such usage was rarely defined by writers and the meaning of the relevant rules can only be gathered from historical records part of which are not even translated into European languages. But some of these rules had been sorted out and classified much earlier in the systematic expositions of

* © C. H. Alexandrowicz, 1967.

¹ Nussbaum, *A Concise History of the Law of Nations* (1954).

² Not including China and Japan which remained in isolation prior to the nineteenth century.

³ Van Leur, *Indonesian Trade and Society* (1960).

⁴ Collections of treaties by Bicker, Heeres, Aitchison, Hertslet, etc.

statecraft written in the classical period of Hindu literature. Among the works of this period Kautilya's *Arthashastra* (fourth century B.C.)¹ is one of the most significant sources indicating the principles of inter-sovereign conduct in India and Further India.² Whether the rules defined in this work have been fully observed by the sovereigns in the post-classical period up to the advent of the European agencies in the East Indies must remain an open question. But it is nevertheless possible to conceive the existence of a Kautilyan tradition even at that period and, to the extent to which its survival (subject to modifications) can be assumed, it is also possible to see the attitude of East Indian sovereigns towards the European newcomer in the East Indies in a better perspective. This would also allow historians to interpret some of the characteristic features of the approach of these sovereigns to negotiations with European agencies. If such an interpretation is possible, in the light of a tradition which evolved from a well-known classical treatise, an examination of the impact of its principles on the general development of the law of nations could also be attempted.

In 1960 an All-Indian Seminar was held at the University of Delhi which concerned itself with the possible contribution of Indian traditions to the development of international law.³ The reading of the Report of the Seminar (which is not commercially available, but can now be found in a few libraries) deserves the attention of historians of the law of nations.

Dr. Rao, Vice-Chancellor of Delhi University, who inaugurated the Seminar, expressed in his opening address the view that the origin of Indian traditions of international law should be sought in *dharma*, the law of righteousness. Indian traditions (he said) are remarkable for their actual or possible reliance on dharmic rules regulating relations between the individual, the family, the community and the State. This system tried to circumscribe the anarchic freedom of the individual and to convert it into a disciplined one. In the inter-State field it found its expression in the habit of discussing conflicting views and interests, arguing and negotiating 'to the limit' in order to preserve peace.⁴ The Seminar concentrated on

¹ See translations from Sanscrit by R. P. Kangle (1963) and by Shamasastri (1951). Among the post-vedic sources containing rules of inter-sovereign conduct are the Ramayana, the Mahabharata, the codes of Manu and Yajnavalkya, Kamanadaka's Nitisara, Kalidasa and the works of the Jaina writers (Somadeva and Hemachandra); see U.N. Ghoshal, *History of Indian Political Ideas* (1959). But Kautilya's *Arthashastra* gives the most systematic and complete code of rules dealing with inter-sovereign conduct. As to the meaning of classical or post-classical period, see Ghoshal, op. cit., and Altekar, *State and Government in Ancient India* (1958).

² For the purpose of this study, Further India is an area beyond the Indian sub-continent covering Ceylon, Burma, Siam and the Indonesian Islands (also Indo-China).

³ *Indian Traditions and the Rule of Law among Nations: Report of the All-India Seminar* (1960). A number of well-defined questions were put to its participants by Professor Julius Stone.

⁴ Dr. V. K. R. V. Rao's view was *mutatis mutandis* reiterated by Professor J. D. M. Derrett in his critical comment on the Report of the Seminar (*International and Comparative Law Quarterly* 11 (1962), p. 266) in which he considers the question what the world could learn from India's cultural heritage. In an answer to this question he refers to the Gandhian theory of life and its

a number of problems such as the significance of *pacta sunt servanda* in *dharmasastra* and *arthasastra*; the importance of *mandala* (circle of States) as the expression of balance of power; the role of the principle of non-violence (*ahimsa*); the settlement of conflicts by third-party judgment;¹ and the record of diplomacy and negotiation 'to the limit'. The Seminar also compared some of the Hindu traditions with Islamic traditions in India and it examined the question of the extent to which the Indian foreign policy makers at present have tended to act on these ancient traditions.

Before some of these problems are considered it would be relevant to state that it serves no purpose to examine the direct and immediate impact of ancient Indian traditions of inter-State conduct on present-day Indian foreign policy or on our system of international law. The Government of India, as well as the governments of other newly independent States, apply the principles of international law as they find them in the existing treaty and customary law observed by the Family of Nations. The Indian Government may claim to have followed a *sui generis* ideology in international politics, but this ideology is certainly not the direct outcome of the ancient inter-State law of India.² What the participants of the Seminar failed to consider is the point in time at which Indian traditions of inter-State conduct were still capable of exercising a direct influence on our system of the law of nations. It must be recalled that these traditions came to an end with the collapse of the independent State system in India and Further India at the end of the eighteenth century and the beginning of the nineteenth century. The possibility of such influence simply vanished at a later date when the Indian sub-continent was either under British administration or under the paramountcy of the Crown, and when the various States of Further India came either under British or Dutch rule or remained semi-independent only and ceased to act on their ancient traditions of inter-State conduct. The only point in time at which a direct influence of such traditions on our law of nations was possible was the period of the sixteenth, seventeenth and eighteenth centuries: at that time many of the sovereigns of India and Further India still enjoyed genuine independence and maintained treaty and diplomatic relations with the European agencies in the East Indies (exercising direct or delegated sovereign powers) to which they tended to apply some of their own notions and usages of inter-State conduct.

dharmic aspects and he points to the ancient Indian experience of relying on an inter-group public opinion and its pacifying influence in the past. See also Professor Derrett's views in the 'Maintenance of Peace in the Hindu World: Practice and Theory', *Indian Year Book of International Affairs* 7 (1958), pp. 361-87.

¹ The Seminar expressed the view that such third-party judgment did not exist in ancient India.

² The view was expressed at the Seminar that non-violence (*ahimsa*) was quite alien to Indian tradition and practice in inter-State relations. See Derrett, *International and Comparative Law Quarterly*, 11 (1962), p. 266. But the doctrine of *ahimsa* tended to be respected in Jainist and Buddhist practice.

It is in the framework of these treaties and diplomatic relations that the confrontation of European and Asian legal concepts took place, exercising a measure of influence on the general development of the law of nations. With these considerations in mind an attempt will be made to discuss some of the ancient Indian traditions of inter-State conduct, particularly those evolved from Kautilyan principles, and to recall a few instances in which their application in the sixteenth, seventeenth and eighteenth centuries can be traced in treaties or other transactions concluded with European agencies.

ARTHASASTRA

One of the remarkable features of Kautilya's *Arthashastra* lies in the fact that it is a work containing not only rules of government and administration but also a systematic exposition of principles of inter-sovereign relations.¹ Until Kautilya, Chandragupta Maurya's Chancellor, completed his treatise in the fourth century B.C., politics had not been an independent science in India but remained largely a branch of social ethics.² *Arthashastra* constitutes a divorce of politics (internal and external) from moral philosophy and creates a dichotomy typical of brahmin learning which contrasted sharply with the Buddhist concept of the supremacy of moral law over and above politics.³ In terms of European philosophy it might be comparable with the efforts of those theologians and lawyers who tried to extricate the *jus gentium* from the grip of theology. St. Thomas Aquinas was no doubt aware of the need for some separation of the two disciplines, but it was Grotius who made the first decisive effort to conceive the law of nations as a discipline with an existence independent from theology or metaphysics. Comparisons of works so remote in space and time are usually precarious, but there is no risk in emphasizing the trend towards the emancipation of rules of inter-State conduct from religion at different periods in Europe and in the East, though the process of secularization took place in different ways and circumstances. We shall revert to this problem later.

A brief summary of Kautilya's work is bound to start with the fundamental notions of the State on which the further structure of inter-State conduct is superimposed. Unlike the Buddhist doctrine which tends to

¹ Ghoshal, *op. cit.*, discusses the gradual development of the literature on politics beginning with the vedic literature, the brahmanical law books (*smritis* and *puranas*) and the works of the Buddhist and jaina writers. Among the Buddhist writers he refers particularly to Aryadeva, representing the unitary moral standard characteristic to Buddhist doctrine (different from the dual standards of brahmanism).

² In the *dharmasastras* the theory of kingship, sovereignty and inter-sovereign conduct was not yet conceived by itself but only as an *incident* of the comprehensive scheme of the social structure. Kautilya perfected the theory and it was then incorporated in the later works written between 200 B.C. and A.D. 300. See Ghoshal, *op. cit.*

³ Buddhist theory considered the science of politics as morally questionable. See C. Drek-mayer, *Kautilya and Community in Early India* (1962), p. 221.

see the foundations of the State in a quasi contractual relationship between ruler and people,¹ Kautilya—in a truly brahmanist (or Hobbesian) way—is a pessimist and sees government as a remedy to the universal anarchy, or ‘the law of the fish’ according to which the stronger swallows up the weaker (*matsyanyaya*) (I. 4). The answer to anarchy is *danda* which may *inter alia* mean punishment or sanction. If the sovereign does not use the rod, it gives rise to the law of the fish. He is honoured if he uses it in a just way, he is despised if he is mild, and hated if he is too severe (I. 4).

Sovereignty is vested in the ruler (dynasty);² but his position within the State is of a peculiar nature, for he is part and parcel of the caste system (*varna*), a social structure of divine origin based on a hereditary division of social functions. The remarkable feature of this system is the separation of the religious function from political power. The first is exercised by the brahmans, the highest caste, while the second is vested in the rulers’ or warriors’ caste (*kysatras*).³ A logical consequence of this separation of power was the secularization of the royal function in the hands of the *ksatryas*⁴ and this led further to a secular concept of the law of inter-sovereign conduct, a development quite different from that in Europe at a much later date (Middle Ages). Moreover, the existence of the same caste system across the vertical boundaries of hundreds of States in India and Further India created a horizontal social stratum (whether rulers by birth or by legitimation) with its own bonds of solidarity. Thus dynastic legitimism⁵ and to some extent inter-dynastic solidarity are two of the elements

¹ Buddhist theory contemplates an ideal state of nature which makes it possible for the sovereign and his people to enter into a pact. It rejects the divine origin of classes, but tends to view the sovereign as a religious figure. If so, the sovereign is involved in the propagation of his religion and he cannot be secular. On the other hand, the Kautilyan system separates the ruler’s caste from the priestly caste, and allows him to pursue a non-discriminatory policy as far as religion or civilization is concerned. Under this system there is no conflict between temporal and spiritual power. See Ghoshal, *op. cit.*, chs. XXVI–XXVII.

² Hinsley in his recent work on *Sovereignty* (1966) draws our attention to the gradual evolution of the concept of sovereignty. The theory that sovereignty in the Hindu State was vested in the people seems doubtful. See H. Chatterjee, *International Law and Inter-State Relations in Ancient India* (1958); and J. W. Spellman, *Political Theory of Ancient India* (1964). The sovereign was probably the ultimate proprietary lord of the land and *ryots* (small farmers) received from him small holdings as lease-holders. The *zamindars* (and those assimilated to them) had no proprietary rights, but were revenue collectors only. It was in the absence of great landowners (hereditary) in India that the sovereign’s power became absolute. See R. Patton, *The Principles of Asiatic Monarchies* (1801). For a different view according to which territory was not vested in the sovereign but belonged to the State (*rajya*), see Ghoshal, *op. cit.*, p. 213, 370.

³ Rulers had the title of *rajas* even if they were not *ksatryas*. On the other hand, *ksatryas* were *rajas* even if they were not rulers; see Ghoshal, *ibid.*

⁴ L. Dumont, ‘Conception of Kingship in Ancient India’, *Contributions to Indian Sociology* (1962).

⁵ As to the merits of the hereditary monarchy and dynastic legitimism, Kautilya in his definition of the seven constituent elements of the State (king, minister, country, fortified city, treasury, army and allies) refers to the king as one born in high family (VI. 1), and elsewhere he says that in the people’s conviction a weak king of noble birth is preferable to a strong but low-born king (VIII. 2). He also pronounces himself against the foundation of new dynasties, for the king of an established dynasty remains faithful to the traditional concept of royalty. It would follow that

which gave some coherence to the otherwise heterogeneous network of States in the Indian sub-continent. Heterogeneity was first and foremost linguistic (as it is today), but also racial or ethnical, if we consider the differences between the Aryan North and the Dravidian South.

An important consequence of inter-dynastic cohesion or solidarity was the principle of respect shown by the victorious ruler to the sovereignty of the defeated ruler. In order to understand this principle which was so essential in the history of Indian States, a brief analysis of the pattern of the network of States has first to be attempted. The classic model of this network is based on the concept of the circle of States (*mandala*), that is to say a group of States linked together by their common affairs of peace and war which found expression in bonds of alliance and neutrality, or in hostility. In the centre of the circle is a hypothetical ruler (*vijigishu*), an egocentric sovereign and 'would-be' conqueror, who envisages the world round him as an area of expansion. He considers his immediate neighbours as enemies (*ari*) and the neighbours of his neighbours as friends (*mitra*). In the periphery of the circle are the friends of his enemies, the friends of his friends, and the friends of the friends of his enemies.¹ This obviously seems to be a post-Vedic chessboard concept which is not to be taken literally, but it symbolizes, in the absence of an organization of States, the idea of balance of power.² The *vijigishu* in each circle acts in principle according to *dharma* (law of righteousness) but in practice according to expediency (*artha*), and conducts his policy according to requirements of security.³ But there was not much security in this dynamic arrangement as the Indian sub-continent was covered by a multitude of circles, the centre of each constituting a source of aggression. Prima facie no concept of co-existence seems to be implied in the whole system, but if its deeper motives are explored, some purpose and order tends to emerge out of the chaos. For the final aim of this dynamic policy was the unification of the sub-continent under the most successful *vijigishu*, who would replace decentralization by a universal empire. The sovereign who, through political manœuvring or conquest⁴ would gain control over other sovereigns,

in case of war the victorious ruler must abstain from *debellatio* of a defeated ruler, particularly when the latter is of noble birth (principle of inter-dynastic solidarity); see below, pp. 307-8, The theory of the seven elements of the State appears also in *Manu*, *Yajnavalkya* and in the *Mahabharata*. See Kalidas Nag, *Les Théories diplomatiques de l'Inde ancienne et l'Arthasastra* (1923). As to the doctrine of the Sovereign and inter-Sovereign relations in *Manu*, see *The Laws of Manu* (transl. by G. Bühler, 1886).

¹ The circle should be established by the *vijigishu* in front and in his rear (VII. 13).

² The concept proposed by Kautilya proves that he conceived *Arthasastra* in the light of pre-Mauryan experience, i.e. before the establishment of the centralised Mauryan Empire.

³ In spite of the fact that *dharma* prevails in case of conflict over *artha*.

⁴ Kautilya advocates political persuasion in preference to war. He states that the powerful sovereign 'should subjugate the weak by means of conciliation' (VII. 16); R. Bhaskaran, 'The Four Upayas of Hindu Diplomacy', *Indian Year Book of International Affairs*, 3, (1954) p. 126.

would become the supreme suzerain or emperor (*cacravartin* or *sarvabhauma*),¹ an ideal rarely realized in Indian history and if it was achieved it usually only lasted for a short period. The Mauryan dynasty unified India during one century and the next effective unification covering the whole sub-continent (or the greater part of it) lasted barely three centuries (Moghul India).² In the interminable process of unification, oscillating between centralization and decentralization, a network of suzerains and vassals established itself gradually and some dynasties rose to the level of major powers while others became dependent on one or another overlord. But whatever their position in the network, they remained in principle on the political map of India even if subjected to the control of an actual or potential suzerain or unifier of the sub-continent. Contrary to European practice in the past, *debellatio* was rarely applied here to a defeated ruler. This rule would seem to reveal the consciousness of some inter-dynastic solidarity which prevailed throughout the rulers' stratum (caste). Though it was not an integrative force unifying the Indian sub-continent, it was certainly a social force modifying the harshness of power politics and wars. The European agencies in the East Indies had found their place in the local network of suzerain-vassal relations whether as suzerains or vassals (real or nominal). Whenever they tried to do away with the rights of their subordinate vassals, they became involved in serious conflicts; and there is no reason to doubt that some of the European writers (Vattel, Justi, de Martens)³ who became familiar with Eastern State practice formulated their views on sovereignty *inter alia* under the impact of that practice.⁴

The most important part of *Arthasastra* as far as the rules of inter-State conduct are concerned is Book VII relating to the so-called six measures of foreign policy. The first two of these measures are peace (*sandhi*) and war (*vigraha*), the latter being a legitimate institution of the Indian State system in the past.⁵ They are followed by neutrality (*asana*), the preparative stage of entry into action (marching—*yana*), alliance (*samsraya*) and dual policy.⁶ Peace can, according to Kautilya, be maintained by the conclusion of a treaty with a more powerful sovereign, while war is waged

¹ The *sarvabhauma* is the performer of a sacrifice reserved to suzerains (*asvamedha*).

² The period of the Mauryan Empire and its succession States lasted from 325 B.C. to the fourth century A.D. The latter were followed by the Imperial Guptas. But neither the Guptas nor their successors, nor the pre-Moghul Islamic dynasties unified the whole of India.

³ See Justi, *Les gouvernements de l'Europe comparés à ceux de l'Asie* (1762). As to Vattel and G. F. de Martens, see below, pp. 319–20.

⁴ As to instances of legal protection of vassal rulers, see this writer's, 'Treaty and Diplomatic Relations between European and South Asian Powers', *Receuil des cours* (1961), pp. 207–320. See particularly the case of the Raja of Benares, below, p. 216. On the problem of inter-dynastic solidarity see the critical comment by Upendra Baxi, *Kautilyan Principles* (Grotian Society Papers, 1967).

⁵ Wars were often connected with frontier disputes, sharing of river waters, dynastic feuds, etc. See M. V. Krishna Rao, *Studies in Kautilya* (1958).

⁶ I.e. peace with one ruler while war is waged with another (*dvaidhibhavah*).

against the weaker one. The idea of neutrality is not comparable to our concept of neutrality but indicates an intermediary stage (neither peace nor war). Alliances are concluded to obtain the protection of a powerful ruler. Kautilya states that the purpose of the sixfold policy is to make a sovereign advance from the stage of decline to the stage of balance, and further to the stage of progress (VIII. 1). He explains in VII. 1 what he means by advancement, i.e. the promotion of one's own 'undertakings concerning forts, water works, trade routes, settling waste land, mines . . . forests If there is equal advancement in peace or war, he [the ruler] should resort to peace. For in war there are losses . . . '.

The system of political expediency shows the true nature of treaty-making in India. Sovereigns are in principle reluctant to conclude a treaty as this involves a limitation of sovereignty and reveals a position of weakness. If the conclusion of a treaty was absolutely necessary, a personal treaty was preferable to a real treaty which would bind the heirs and successors of the contracting sovereigns.¹ But in spite of the disadvantages which may follow from treaty-making, Kautilya emphasizes strongly the principles *pacta sunt servanda* and *bona fides*. Once a treaty is concluded, it is absolutely binding, irrespective of the sanctions attached to it. He states in VII. 17: 'Pledging one's faith or taking an oath is a pact stable in the next world as well as here, a surety or a hostage is of use only in this world, depending on strength. "We have made a pact" thus Kings of old, faithful to their word, made pacts by pledging their faith.'

The pressure within the circle of States made the ruler advance from the state of decline to that of balance and progress, but the circle was, in spite of its dynamism and its relations with other circles, governed by principles which assured a measure of external stability and public order. No sovereign could afford to violate these principles without the risk of losing the confidence of other sovereigns in the circle. Thus each sovereign had the sacred duty to respect the right of other dynasties to continuous existence. *Debellatio* in case of defeat would have been a provocation of the circle, which would have risen against the violator of this right. Kautilya states that the just conqueror is satisfied with the obeisance of the defeated ruler (XII. 1).² A weak ruler may be compelled to cede part of his territory but he should retain the capital of his country (XII. 1). He advises the strong sovereign that 'if the weaker [ruler] were to remain submissive in all respects, he should make peace with him. For heroism

¹ As to various types of treaties, see VII. 3.

² Kautilya contrasts the righteous conqueror with the 'greedy' and 'demoniac' conquerors (XII. 1). The righteous conqueror would obviously respect the caste structure of the people of the defeated country, including its Ruler and dynasty. This is *ksatrya* tradition (W. Ruben, 'Inter-State Relations in Ancient India and Kautilya's Arthasastra', *Indian Year Book of International Affairs*, 4 (1955), p. 141). In this way the *vijigishu* respecting the continuity of the monarchy of his neighbours safeguards the continuity of the monarchical institutions in his own country.

born of grief and resentment make one fight bravely like a forest fire. And he [the weaker ruler] becomes the object of favour of the circle [of kings]' (VII. 3). And, further, he speaks about the (middle) king grown very powerful, who 'has risen for the destruction of all of us'. The circle should rise against him (VII. 18). In the same way advantages gained by the breach of a treaty are detestable to the circle of States. Kautilya states: 'A gain repugnant to the circle [of Kings] because of the extermination of an ally or the violation of a treaty is an advantage that is dangerous' (IX. 7). Thus the circle is, on the one hand, a dynamic vehicle for the unification of the sub-continent and, on the other, a guarantee of restraint on the part of the rulers and a means for the preservation of the balance of power. The next stage (failing unification) would be the establishment of an international organization, a step which was taken neither in Europe nor in Asia prior to the twentieth century.¹ But confederations of States appeared in the Indian sub-continent in the eighteenth century, to mention only the Maratha State, an association of rulers under the supreme government of the Peshwa at Poona. Moreover, the Moghul Empire at the stage of its decentralization in the eighteenth century became a composite entity similar to the Holy Roman Empire.²

Kautilya underlines the importance of negotiations between sovereigns which played a considerable role in the conclusion of alliances and in affairs of war and peace (I. 16). Negotiation 'to the limit' was the principal medium of finding a solution of conflicts before resorting to war. Instead of turning to hostilities, rulers—in a truly Kautilyan spirit—tried to gain the desired advantages in the 'battle of wits' (*mantra-yuddha*). Negotiations were conducted either by sovereigns or by their envoys (*dutas*). What Kautilya writes about *dutas* finds its confirmation in the *Memoir* of Megasthenes, Greek ambassador to the court of the Mauryan Emperor. Megasthenes was sent in the fourth century B.C. by Seleucus Nicator with an embassy to Chandragupta Maurya. He wrote four books of *Indica*, of which only fragments remain. These have been translated into English³ and contain information about the emperor, his court, the civil service and the caste system as well as other details.⁴

On envoys Kautilya writes (in I. 16) that 'when consultation had led

¹ Emeric Crucé in his Project of a Universal Union of States (*Nouveau cynée*, 1623) included not only European powers but also a number of Asian sovereigns, such as the Ottoman Emperor, the King of Persia, the Moghul Emperor and other sovereigns; see E. Nys, *Les origines du droit international* (1894).

² As to the similarity between the two empires in the eighteenth century, see Westlake, *Collected Papers on Public International Law* (1914) p.197; see also F. J. Berber, 'International Aspects of the Holy Roman Empire', *Grotian Society Papers* (1964), vol. 1, p. 174.

³ By J. H. McCrindle in 1877.

⁴ O. Stein, *Megasthenes and Kautilya* (1921). The author attempts a comparison between *Indica* and *Arthashastra*. Megasthenes draws attention *inter alia* to the respect for the rights of non-combatants in India.

to a choice of decision, the employment of the envoy [should follow]. One endowed with the excellence of a minister is the plenipotentiary'.¹ He is a *nirstartha* if the matter has been entrusted to him with full power of negotiation; otherwise he is a messenger only.² The functions of envoys are: 'Sending communications, recording the terms of a treaty, [upholding his King's] majesty, acquisition of allies . . .' (I. 16). As to diplomatic privileges and immunities, Kautilya reserves even to 'the lowest born' *dutas* personal inviolability: 'If not permitted to depart [home], he should stay on.' He may be detained by a variety of reasons. It is remarkable that European ambassadors (whether royal or East India Company envoys), who visited the courts of East Indian sovereigns in the sixteenth, seventeenth and eighteenth centuries, found everywhere the same pattern of diplomatic ceremonial and etiquette which reflected diplomatic usages described in the classical literature. They often complained about restrictions imposed on their freedom of movement by the receiving courts, which gave the impression of detention but were in principle measures directed against espionage about which Kautilya had so much to say (VII. 13, XIII. 1). Finally it has to be noted that the *duta* was always an *ad hoc*, not a permanent, envoy.

This brief account of the provisions of *Arthashastra* relating to rules of inter-State conduct would not be complete without reference to some of the administrative departments in a Hindu sovereign's government which carried out external functions. Significant among them was the Controller of Shipping (II. 28), whose duty it was to 'rescue boats that have gone out of their course or are tossed about on the sea, when they come within the domain [of the State]', and 'he should destroy [boats] that cause harm, also those coming over from the enemy's territory³ and those violating the regulations of the port'. One of the functions was also the destruction of piratical ships (*himsrika*) (II. 28). Kautilya had no doubt an approximately correct appreciation of the difference between the legal status of inland or territorial waters (within his domain) and the high seas (beyond his domain). He considered (mainly for economic reasons)

¹ As to a discussion of the qualities of an ambassador in classical European literature see Dr. K. R. Simmonds, 'Gentili on the Qualities of the Ideal Ambassador', *Grotian Society Papers* (1964), vol. 1, pp. 47-58.

² *Arthashastra* distinguishes 3 types of *dutas*: (1) The envoy expounding his ruler's affairs and adapting his words to circumstances; (2) the envoy communicating only what he has been told; and (3), the envoy carrying a royal decree. See L. Rocher, 'The Ambassador in Ancient India', *Indian Year Book of International Affairs* 7 (1958), pp. 344-60.

³ The question may arise whether Kautilya deals here with contraband. See R. P. Kangle, *The Kautilya Arthashastra* (1963), commentary to II. 28. As to meaning of the 'domain', see Meyer's translation (1923), p. 198: 'Von Meerschiffen die in sein Gebiet kommen, soll er den Zoll verlangen.' As to pearl fisheries: 'Die Muschel- und Perlen Fischer sollen Schiffszins bezahlen oder auf ihren eigenen Schiffen kreuzen. Ihr Aufseher hat ähnliche Pflichten wie der über die Edelsteinfundgruben.' This is a reference to the similarity of functions of the controller of pearl fisheries and the controller of mines of precious stones.

coastal shipping as preferable to mid-ocean navigation (VII. 12), a notion later abandoned by the Southern Indian maritime powers.¹ Among other administrative departments exercising external functions Kautilya lists the Director of Trade, who 'should encourage the import of goods produced in foreign lands by [allowing] concessions . . . to those [who bring such goods] in ships or caravans' (II. 16); the Superintendent of Mines, who is *inter alia* concerned with the control of pearl fisheries (II. 28), a significant anticipation of administrative regulation of affairs relating to the continental shelf; and the Superintendent of Passports (II. 34).² References to the position of foreigners in Hindu States indicate the spirit of tolerance and non-discrimination with which they were treated. Though the foreigner was in principle outside the social structure of society, he was able to find his proper place under the protection and control of the ruler. Xenophobia was in principle alien to Indian society (particularly in Further India where the caste system was rejected). It tolerated settlements of foreign traders who were allowed to govern themselves by their own law. The establishment of these settlements later led to the adoption of the régime of capitulations.

It has been emphasized above that one of the salient features of the social structure of India (based on the caste system) was the separation of the functions of the two upper strata of society, i.e. the brahmins and the *ksatriyas*. While the first was superior to the second and exercised religious functions and expounded the divine law (*dharma*), the *ksatriyas* monopolized the task of governing the State, which was essentially of a secular character. The secularization of the royal function was a phenomenon which revealed itself in the domain of internal as well as external affairs. While the sovereign ensured internal public order within his realm with the ultimate help of sanctions (*danda*),³ external relations were at the mercy of anarchy. Kautilya's objective was to propose a minimum of principles which could diminish the threat of anarchy (*arajaka* and *matsyanyaya* or the law of the fish, II. 13). These principles were at first of a political nature but they were the outcome of past experience, derived from the period before the foundation of the centralized Mauryan Empire, and they stimulated the gradual establishment of a code of usages and customary rules which was similar to our law of nations in its earlier stages. This code, based on the Kautilyan and post-Kautilyan tradition, was in principle secular and allowed the sovereigns in India and Further India to maintain regular relations *inter se* and later with Islamic rulers, as well as with the European

¹ As to the impact of Kautilyan ideas on maritime practice in the Indian Ocean and indirectly on Grotius, see the present writer in *Recueil des cours* (1961), p. 240.

² G. J. N. Ramaswamy, *Essentials of Indian Statecraft: Kautilya's Arthashastra* (1962).

³ The ruler was never a legislator. His task was to implement the law (*dharma*). But according to Kautilya, the royal edict (*rajasasana*) had the force of law.

agencies which first appeared in the East in the beginning of the sixteenth century.¹ In this way Kautilyan principles, whether in their original formulation or reproduced in the later classic works,² exercised a definite influence on our system of the law of nations which the European agencies were compelled to apply in a non-discriminatory manner, irrespective of race, colour or creed. Without such non-discriminatory application the law would have been in the way of the growth of the much desired East Indian trade, and it had therefore to be stripped of all its original prohibitions of an ecclesiastical nature directed against 'infidels' and applied in a spirit of universality which, incidentally, was not alien to the natural law doctrine as already formulated by St. Thomas Aquinas. This development promoted the establishment of a multi-ideological law of nations, that is to say a law not exclusively allied to any ideology, creed or civilization, but a framework of coexistence of various creeds and ways of life. The European agencies in the East learned the lesson of coexistence of Hinduism, Islam and Christianity in India (particularly on the west coast)³ and transplanted their experience to the West, which had been so long incapable of extricating itself from the obsession of religious wars.

Throughout this section reference has been made to 'Further India'. This region extends to countries which, having escaped various forms of distant Chinese suzerainty, had come under the influence of Hindu civilization and played, together with India, a prominent role in the development of the East Indian trade. The model of the Hindu State and administration had been introduced in these countries through the intermediary of brahmins,⁴ without ever reducing them to the role of dependencies of a possible metropolis in India.⁵ While India ultimately discarded buddhism and reverted to brahmanism, most of the countries of Further India remained permanently buddhist (Burma, Ceylon, Siam, etc.).⁶ On top of the two layers of hinduism and buddhism, Islam started superimposing itself

¹ Unlike the Chinese sphere of influence in which inter-State relations on a footing of equality were in principle not possible.

² See above, p. 302.

³ Swanton, 'A Memoir of the Primitive Church of Malayala', *Journal of the Royal Asiatic Society*, 2 (1835).

⁴ Brahmins were called from India to the Indonesian Islands for the sacral legitimization of dynastic interests and the organization of the State combined with the brahman-*ksatrya* relationship; Van Leur, op. cit., pp. 79-81.

⁵ As to the influence of Hindu polity in Further India, Professor G. Coedes writes as follows: 'De leur côté, les arthasastras ou traités de politique ont contribué à façonner l'administration hiérarchisée des états de l'Inde Extérieure . . .', *Les états hindouisés de l'Indochine et d'Indonésie* (1948), p. 422. The Hindu Kingdoms in Sumatra, Java and Cambodia were never controlled from India. Professor K. K. Pillay compares in this respect Further India with the cultural expansion of Greater Hellas; see 'Early Indian Imperialism in the Far East', *Indian Year Book of International Affairs*, 3 (1954), p. 144.

⁶ Buddhism came from India to Burma in the fifth century A.D. But the idea of kingship remained associated with the Code of Manu and brahmins continued to play an important role at the court; see D. G. E. Hall, *History of South Asia* (1955).

in India and Further India in course of time, until it gained absolute control over the major part of India (under the Moghul dynasty) and the Indonesian Islands.¹ The ideology of the Moghuls deviated significantly from that of the Ottoman Empire, as well as from the traditions of pre-Moghul Islamic rulers in India who had been under the political or religious overlordship of the Caliphs (at first effective, then nominal). The reign of the Moghul Emperors Akbar, Jehangir and Shajahan witnessed the victory of a secular policy in inter-group relations in India, no doubt under Hindu influence and in conditions of decline of the *jihad* ideology² which, even within the Ottoman Empire, later gave way to treaty and diplomatic relations with European powers and with dissident Persia (sixteenth-century).

In this summary of Kautilyan principles reference has not been made to principles relating to the law of war (*vigraha*) (VII. 1), particularly to the prohibition of the use of poisonous and other objectionable weapons, the distinction between combatants and non-combatants and their treatment (X. 4), and to principles concerning *temperamenta belli* (X. 3, 4). The examination of these provisions would require extensive research into the norms of *yuddha-dharma*.

VIJAYANAGAR AND THE MARATHAS

It is not possible, in the limits of this inquiry, to discuss in detail the Kautilyan tradition as followed in India or Further India during the sixteenth, seventeenth and eighteenth centuries. But a few instances in which it revealed itself more clearly may be examined. They are drawn from the history of the last two great Hindu powers in India, i.e. Vijayanagar and the Marathas. Reference may be made to two early Portuguese sources relating to the Kingdom of Vijayanagar, namely the *Book of Duarte Barbosa*³ and the *Chronicle of Fernao Nuniz* (1535-7).⁴ Barbosa gives an excellent description of Vijayanagar, its position in South India and its political significance. Encircled by a number of Islamic States, it took advantage of the advent of the Portuguese in the beginning of the sixteenth century and increased, with their help, its military potential and resistance to Islamic pressure. In 1520 Krishna Raja, king of Vijayanagar, defeated the Adil Shah of Bijapur at the battle of Rajchur and after the termination of hostilities an embassy from the defeated Muslim ruler came

¹ Islam destroyed the central power of the Majapahit Empire on the Island of Java. Van Leur, op. cit., p. 172.

² MacLagan, *The Jesuits and the Great Mogul* (1932); P. Spear, *Twilight of the Moghuls* (1951); M. K. Nawaz, 'Jihad', *Indian Year Book of International Affairs* 8 (1959). Emperor Akbar (1542-1605) abolished *jizyah*, a capital tax imposed on non-Muslim citizens (*dhimmis*).

³ Translated in 1918 by M. L. Dames.

⁴ Reproduced in R. Sewell's *A Forgotten Empire: Vijayanagar* (1924), which also comprises fragments of *The Narrative of Domingos Paes* (1520-2).

to the Vijayanagar court. Fernao Nuniz gives a vivid account of the embassy, and particularly of the speech of the ambassador (*matucotam*) addressed to Krishna Raja. The following are extracts from the speech:¹

'Sire, the Ydallcao [King of Bijapur] my Master, sends me to you; and . . . requests you to do him justice. He bids me to say that he bears very good will towards you as a real, powerful, just and sincere Prince; that you have *without reason* violated the friendship and the peace observed and respected by *all Rulers* . . .² that he does not understand why you had come from your kingdom to attack him; that he had been without suspicion when he learned that you besieged the City of Rachol [Rajchur] and that you ravaged and destroyed his country which made him come to its rescue; that all members of his court have been killed by you and his camp invaded and devastated; that you are witness to all these happenings and that he requests you to . . . return to him his artillery, tents, horses and elephants and all the rest taken from him and to hand back to him the City of Rachol; that if you will give him satisfaction and make restitution of what belongs to him, you can count on him as your loyal friend; but if you refuse to do so, your action will be evil even if it pleases you.'

Nuniz writes that after the speech the ambassador received a silk dress and the customary gifts. At the next audience the king gave him his reply, 'that he is ready to make all restitution asked by the Ydallcao but under one essential condition, that the Ydallcao would come and render him homage and obeisance'. This embassy has been chosen among other events as typical of inter-sovereign relations in the sixteenth century. It gives us a description of diplomatic usage observed at that period. The ambassador's argumentation follows the classic tradition, for he accuses the king of having broken 'without reason' the peace respected by 'all rulers' in the regional circle of States. On the other hand, the Hindu sovereign applies to the defeated ruler the classic principle of vassalization. He asks him to recognize him as his suzerain.³

Nuniz and Barbosa give us a description of the particular network of suzerain-vassal relations in this part of India. Both also write about the Vijayanagar administration (the king's officers), which comprised the Minister, the treasurer, the master of the horse, the various superintendents, the provincial governors and others. The whole account is reminiscent of the Kautilyan administrative pattern which has just been described. The kingdom of Vijayanagar, which originally extended to Telengana, Tamilnad, Kanara and Carnatica, declined after the battle of Talicot (1565) and was finally stripped of its last possessions by the

¹ See translation by Sewell, *op. cit.*, p. 352.

² Italics are mine. It is notable that the ambassador (*matucotam*) argued in terms of Hindu tradition.

³ The embassy also referred to the custom of restitution of war material and prisoners of war after the battle (subject to compensation). Attention may be drawn to the Vijayanagar embassy to the Bahmani Court (1367), which pressed for the conclusion of an agreement by which the contracting parties would renounce the barbarous habit of killing prisoners of war; see Farishta's *Chronicle* (transl. by Briggs), p. 170.

Marathas (1677). Professor Nilakanta Sastri describes it as 'the last refuge of the traditional culture and institutions of the country'.¹ But in fact these institutions, and some of the Kautilyan tradition, survived among the Marathas until the beginning of the nineteenth century.

The Maratha State had been founded by Shivaji² in the seventeenth century, but the sovereignty over the State passed later from his descendants to the Peshwa, who became the hereditary head of the Confederacy of the Maratha Chiefs with its capital in Poona. The Confederacy comprised Baroda, Indore, Gwalior, Nagpur and other States.³ The Peshwa governed the Confederacy with the assistance of the *mandala*, the supreme council of the circle of associated States, composed of eight members. The administration extended to authorities in charge of the army, public works, postal services, finance, trade and other departments. One of the officers, the *dabir* or *sumant*, was concerned with foreign affairs.⁴ The whole organization, which was under the predominant influence of brahmans, reflected the Kautilyan administrative system (II. 5, 6, 16, 18, 19, 21, 28), though modified by Islamic influence which gradually reduced the importance of the *mandala* in favour of the autocratic rule of the sovereign.⁵

The *Transactions of the Royal Asiatic Society*⁶ contain the translation of the correspondence of the Peshwa's court (1761-72) prepared by J. Briggs who, in his commentary on the text, draws attention to the fact that some of the authors of the letters were his contemporaries and that events described in them were still vivid in the memory of his generation. At the period covered by the correspondence the relations of the court at Poona with European agencies were still very limited. And, as the translator points out, the correspondence is therefore an example of source material which reflects the activities of an Indian court not being under any external influence, but acting on its own traditions. In conclusion, he underlines the importance of the correspondence as an historical document and praises the high qualities of the Marathas, particularly the religious tolerance of the Hindus.

The correspondence contains the text of a number of Maratha treaties, such as the treaties of 1767-9 between Peshwa Madha Rao and Raghunad Rao (*Ragoba*). According to these treaties, the Maratha Chiefs Sindia, Holkar, Nara Sankar and others undertook to render the 'customary services'

¹ K. A. Nilakanta Sastri, *A History of South India* (1955), p. 293.

² Before his coronation (1674), Shivaji had been initiated by brahmans in the rules of the *ksatrya* caste; Bal Krishna, *Shivaji the Great* (1932), vol. 1, pp. 1-2.

³ 'The Maratha Government in many instances resembles the feudal system in Europe; the great chieftains, like the ancient barons, hold their lands by military tenure'; J. Forbes, *Oriental Memoir* (1834), vol. 1, p. 338.

⁴ M. G. Ranade, 'Introduction to the Peshwa's Diaries', *Journal of the Bombay Branch of the Royal Asiatic Society* 20 (1902), pp. 450 et seq.

⁵ Ranade, *ibid.*

⁶ 1830, vol. 2.

to the Peshwa (their overlord) and to abstain from direct communications with other States. It was stipulated in the treaty of 1767 that external communications would take place only through the intermediary of the government of the Peshwa (Article 6). These stipulations reflect *mutatis mutandis* Kautilyan principles relating to suzerain-vassal relations.¹ In the same way the Maratha administration (central and local) reflected to some extent the Kautilyan tradition. The Peshwa's secretariat at Poona (brahman) was composed of several departments and bureaux (revenue, expenditure, accounts, land revenues, public service, etc.). The daily registers of the departments (*roz kird*) recorded all transactions, grants and payments. The Maratha local administration was headed by the *mamlatdar* who was in charge of the various divisions (*sarkar, subha*), or by his subordinates in charge of smaller territorial units (*parganas*). In his account of the Maratha administration S. M. Edwardes states that the whole scheme of government was based on Kautilyan principles. He describes it as a combination of rules derived from the ancient works of Hindu polity, such as *Arthashastra*, and the customs and usages evolved out of the Maratha practice, which modified the former. Kautilyan principles revealed themselves in the internal government of the Maratha State as well as in its external relations.²

To these few instances collected from Vijayanagar and Maratha history other examples can be added, such as those drawn from the history of the Rajputs and the west coast of India, where the majority of States were governed by Hindu rulers (Cochin, Travancore, Quilon, Calicut and other minor States).³ The Rajput princes, who preserved in their dealings *inter se* and in their external relations the customs of ancient Hindu polity, exercised considerable influence on the Moghul emperors, who acknowledged their separate existence as vassals of the Empire. The history of the west coast of India is also illustrative of the kaleidoscope of suzerain-vassal relations, which were later recorded by Jean Bodin in his classic *De la république*.⁴ A vivid account of the administration of the Hindu States in this part of India given by François Pyrard de Laval and recording details relating to its civil service, registers of foreign trade, movement of foreigners and other events, cannot fail to remind the reader of the ancient Hindu pattern of administration.

The precise notions of sovereignty which the East Indian sovereigns inherited from their ancient traditions conceived the sovereign as the only agency capable of conducting external affairs. When the Dutch, English

¹ According to which the vassal should not undertake diplomatic negotiations without the permission of the suzerain (XIII. 5).

² *Cambridge History of India* (1929), vol. 5, p. 384.

³ K. P. Padmanabha Menon, *History of Kerala* (1929).

⁴ *Les six livres de la république* (1577), VI. 2 (630).

and French East India Companies appeared in the East and not only engaged in commercial activities but also acted on their delegated sovereign powers, the question arose whether the East Indian sovereigns would be able to fit them (as commercial companies) into their concept of sovereignty. In practice a satisfactory answer to this question was found only in course of time, when the East India Company governors assumed the status of quasi-sovereigns and set up court in the Asian fashion. Even when all obstacles to co-operation were overcome under the pressure of the growing volume of trade, there remained the traditional reluctance of East Indian rulers to conclude treaties, which had its roots in ancient traditions of Hindu polity. For example, De la Loubère, French ambassador to the Court of Siam (seventeenth century), states that everywhere in the East Indies it is easier to obtain a unilateral grant than to receive any concessions by treaty, which is considered a limitation to the sovereignty of the conceding ruler.¹

The accounts of English ambassadors to the Court of Ava in the early nineteenth century testify to the reluctance of the latter to enter into treaty negotiations as incompatible with their concept of sovereignty.² The European negotiator rarely failed to produce a draft agreement in conclusion of the bargaining process, and in the course of time a number of East Indian courts took advantage of the procedure of treaty-making. The Courts of Kandy and Poona were among the first to engage in extensive treaty-making and the former, faced with a succession of European agencies in Ceylon (the Portuguese, the Dutch and the English), knew how to negotiate with one against the other and thus to maintain and strengthen its own sovereign status.³

CONCLUSION

The above analysis of the Kautilyan tradition could be summed up in the following way: Kautilya conceives as his point of departure the resistance against internal and external anarchy (our present-day problems relating to external anarchy are *mutatis mutandis* the same). A community protects itself against the consequences of anarchy by the establishment of a supreme authority—the king (III. 13). The king exercises executive and judicial functions and applies the law within the boundaries of the State (III. 1).⁴ Though we cannot find in the classical law a clear distinction

¹ De la Loubère, *Description du royaume de Siam* (1714).

² D. G. E. Hall, *Michael Symes: Journal of his Second Embassy to the Court of Ava in 1802* (1955); J. Crawford, *Journal of the Embassy from the Governor-General of India to the Court of Ava* (1829).

³ See the present writer in *Recueil des cours* (1961), cited above, p. 285.

⁴ As to the King's legislative function and the role of *rajasasana*, see N. C. Sengupta, *Evolution of Ancient Indian Law* (1954).

between public and private law (personal law), there was a certain juridical area which could be classified as one of public law, such as the organization of the government and the administration (I. 3, 4; II, 3, 6, 16, 18) and the direction of the national economy (public works, industry, mining) (II. 1). The functions of the king in the sphere of his internal sovereignty are intimately connected with his task of protecting the community against the hazards of external anarchy (I. 17). The king exercises all prerogatives of external sovereignty in the sphere of inter-State relations, which is beyond the pale of the law. Kautilya concerns himself systematically with external anarchy; he tries to formulate the customs and usages of State practice in the past, and suggests at the same time principles which could form the basis of customs and usages in the future. Among these principles some of the most significant are the following:

The principle of individual responsibility of each sovereign within the collectivity or concert of all sovereigns in the circle of States (*mandala*) for the maintenance of a measure of inter-State public order which is essential to diminish the consequences of anarchy; the principle of balance of power within the circle, modified by the evolution towards centralization of power and potential unification of States under a supreme authority (*kakravartin*, suzerain); the principle of respect for the sovereignty of the dependent or subordinate (vassal) rulers, and the rejection of *debellatio*, which follows to some extent from inter-dynastic *ksatrya* cohesion or solidarity (as rooted in the social structure of society beyond political frontiers); the secular character of inter-State customs and usages (resulting from the separation of royal and religious functions) which leads to the establishment of a multi-ideological framework, that is to say a system which is not allied exclusively to any particular ideology, creed or civilization, but constitutes a régime of coexistence (Hindu, Buddhist, Islamic and Christian States); the principles relating to the treatment of foreign settlements, which later led to the régime of capitulations; the principle of negotiation to the limit before resort is made to sanctions or force (or even voting) for the solution of conflicts; the employment of diplomacy for carrying out negotiations and the protection of the envoy (*duta*) by diplomatic privileges; finally, the preference given to customary law and usages (para-legal solutions) over treaties, which are a limitation to sovereignty and reveal the initial reluctance of States to submit to treaty sanctions.

To what extent have some of these principles had an impact on the development of our system of international law? Some of them were similar to those applied by the European agencies, but some were different and called for mutual adjustment to make commercial co-operation a workable proposition. Perhaps the strongest influence of the Kautilyan tradition revealed itself in the trend towards the secularization of the law of nations

in the Hindu sphere of influence in the East Indies.¹ This trend, supported by the mutuality of interests arising out of the East Indian trade, precipitated the breaking down of barriers and counteracted the prohibition of dealings with 'infidels', which resulted from the protracted religious conflicts in the Christian and Islamic worlds. The principle of responsibility of individual State entities within the concert of States (circle),² corroborated by ties of solidarity (beyond political frontiers), may be considered an intermediary stage in the progress towards unification of the family of nations. It constitutes a pattern of parallel development in the East and in the West, but in the process of concentration of power respect for the sovereignty of dependent States was more pronounced in the Kautilyan than in the European tradition (absence of *debellatio*).³ Burke's pleadings in the trial of Warren Hastings at Westminster, in which the rights of the Raja of Benares (a vassal of the English East India Company) were supported by simultaneous reference to Vattel's *Droit des gens* and to classical Indian traditions, deserves special attention of the historian of the law of nations.⁴

It may also be noted that some of the Kautilyan principles had an indirect impact on a number of European writers in the eighteenth century.⁵ Thus the principle of the balance of power in the East Indies (Asia) is discussed by Reynal⁶ and Justi. The latter, in his work on comparative government in Europe and Asia,⁷ refers also to the merits of the separation of the royal and the priestly functions (*ksatrya* and *brahman*) and its influence on the legal system. Moreover, in his *Historical and Juridical Essays*,⁸ Justi seems perfectly aware of the concept of *mandala*, whether in its Kautilyan or Machiavellian version.⁹ He also gives a special account of the law of warfare in the East Indies, particularly that relating to *temperamenta belli*.¹⁰

In conclusion we may state that it is in the process of confrontation of East Indian and European rules of inter-State conduct that the Kautilyan tradition manifested itself in a more definite manner. For while Kautilya

¹ Which differed so much from the position in the Chinese sphere of influence; see above, p. 301.

² Which found its expression in the respect for the sovereignty of other rulers, the observance of *pacta sunt servanda*, etc.

³ The attitude of the Great Powers towards the partitions of Poland and the settlement of Italian affairs (beginning of the 19th century) may be mentioned as examples.

⁴ Burke, *Works* (1812), vols. 4 and 13.

⁵ Though of course they could not be familiar with Kautilya's work, the full text of which was discovered much later by Shamasastry.

⁶ Abbé G. T. F. Reynal, *Histoire philosophique et politique des établissements et de commerce des européens dans les deux Indes*, (1770), vol. 2.

⁷ Cited above, p. 307, n. 3.

⁸ *Historische und Juristische Schriften* (1760), pp. 186-99.

⁹ See this *Year Book*, 34 (1958), p. 177.

¹⁰ *Historische und Juristische Schriften* (1760), vol. 2 (*Von der Kriegesverfassung*).

had centuries earlier systematically written down the tenets of Hindu government and the customs and usages of inter-State conduct, and while *Arthashastra* had exercised an influence on actual inter-sovereign relations in India and Further India, the ensuing tradition, which had followed State practice, became in the course of centuries more and more circumscribed by modifications and deviations dictated by various factors which shaped the progress of history in the East Indies. But it had survived in largely undefined customs and usages (generally known to brahmins or *ksatryas* only) until the advent of the Europeans in this part of the world. In the course of relations with European agencies, East Indian sovereigns were more than ever before compelled to consider the proposition of negotiation and to define in a more precise manner their proposals or objections, so as to gain the desired advantages in the inter-State 'battle of wits'.¹ It was perhaps then that the undefined tradition took once more a tangible form, before it ultimately disappeared at the end of the eighteenth and the beginning of the nineteenth century. The tentative reformulation of some of its principles in the course of three centuries exercised a measure of influence on the European negotiator and can be traced in the vast number of transactions from which some of our rules of international law were ultimately drawn.²

¹ K. V. Rangaswami Ayangar, *Indian Cameralism: A Survey of some Aspects of Arthashastra* (1949), p. 116 (*mantra-yuddha*).

² An extensive number of East Indian treaties has been systematically recorded by G. F. de Martens in his *Cours diplomatique* (1801); *The Compendium of the Law of Nations* (1789, transl. by W. Cobbett, 1802); and in the *Recueil des traités* (1791). Among these treaties a special section is reserved in the *Cours diplomatique* to the treaties concluded by the Marathas, the last great Hindu power in India. One of the Maratha treaties (the treaty of 1779 concluded with the Portuguese) has been the object of interpretation by the International Court of Justice in the *Right of Passage over Indian Territory* case (Portugal-India), *I.C.J. Reports*, 1960, p. 6.

THE EFFECT OF THE DIPLOMATIC PRIVILEGES ACT 1964 IN ENGLISH LAW*

By MARGARET BUCKLEY

1. *Introduction: Principles of Interpretation applicable in English Courts*

BEFORE the effect of the 1964 Diplomatic Privileges Act is examined an important question arises as to the basis on which it is to be interpreted. In cases of ambiguity, which under modern conditions of the drafting of Statutes are not infrequent,¹ where are the courts to look for guidance? The matter is perhaps more problematic in the case of this Act for the very reason that, while having the ordinary format of a Statute, it includes a Schedule reproducing verbatim selected provisions of the Vienna Convention of 1961 on Diplomatic Relations. The draftsmen may not have anticipated difficulties of interpretation—and none have come to light so far²—but it is necessary to consider the expedients open to the courts should such difficulties arise.

If the 1964 Act did not contain provisions of an international convention in their original form the well-established principle would apply that it might, if necessary, be interpreted in the light of previous decisions which were rendered on the same or a similar subject-matter or on the actual words requiring interpretation. This principle holds good to an even greater extent when there is an earlier *Act* on the same subject-matter which contains the same words as the later Act; for such words are judicially interpreted on the basis of the earlier Act.³ But it is necessary first to determine whether the general rules as to interpretation of Statutes apply to the new Act notwithstanding the inclusion in it of provisions of an international Convention. This point is of cardinal importance. If the courts are to be free to adopt their own interpretations of the new Act and the old decisions are to be excluded from their consideration in cases of ambiguity, and if for the same reason the 'mischief' rule is held inapplicable⁴ because to apply it might involve the courts in consideration of earlier cases, the logical conclusion will be that all the pre-1964 cases are now irrelevant to

* © Margaret Buckley, 1967.

¹ See the letter from R. E. Megarry Q.C. in *The Times*, 2 April 1965.

² See *Empson v. Smith*, [1965] 3 W.L.R. 380.

³ In this case, the only earlier Act is the Diplomatic Privileges Act (7 Anne c. 12), several words of which have been so interpreted and which reappear in the 1964 Act. See generally: Maxwell, *The Interpretation of Statutes* (11th ed.); Kiralfy, *The English Legal System* (4th ed.); Hood Phillips, *A First Book of English Law* (5th ed.); Allen, *Law in the Making* (7th ed.).

⁴ See *Heydon's case* (1584), 3 Co. Rep. 7a.

the post-1964 law of diplomatic immunity. The question thus is whether the courts, when confronted with a Statute in which an international convention is incorporated, are bound to interpret the words as they stand or are to take account of earlier judicial interpretations of those words. Fortunately we are not without guidance on this point, although the cases follow two lines of approach, both of which must be considered before a conclusion can be reached. Several judges have expressed themselves in favour of interpreting the new Statute entirely on its own words; Lord Herschell in *Bank of England v. Vagliano Bros.*¹ said that the proper approach to the interpretation of such an Act is to take the words as they stand and not to interpret them in the light of previous cases. In *Riverstone Meat Company Ltd. v. The Lancashire Shipping Co.*,² it was said that where new rules are introduced as the result of an international agreement, the courts will want to achieve conformity with other Powers in interpreting it. Such a view would again seem impliedly to negative any reference to earlier cases.³ A number of other authorities, however, tend rather to try and find a certain balance between the needs of uniformity of interpretation on the international plane and respect for existing English interpretations of the terms in question.

The Carriage of Goods by Sea Act 1924⁴ involved the incorporation in a Statute of the 'Hague Rules' on that subject, drawn up in an international convention, the preamble to the Act stating that it was 'expedient that the said rules as so amended . . . should . . . be given the force of law'. In *Gosse, Millerd Ltd. v. The Canadian Government Merchant Marine Ltd.*,⁵ a problem of interpretation arose with regard to the expression 'management of the ship' which was contained in Article IV, rule 2(a) of the Schedule. Lord Hailsham L.C. observed:⁶

'The words in question first appear in an English Statute in the Act now being considered, but nevertheless they have a long judicial history in this country . . . *I am unable to find any reason for supposing that the words as used by the Legislature in the Act of 1924 have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date*; and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the Statute now under discussion.'

Lord Sumner added:⁷

'*Prima facie* . . . the interpretation of the words in question, which had been laid down in the English decisions before 1924, had the approval of the Legislature and is *not to be doubted*.'⁸

¹ [1891] A.C. 107 at 144.

² [1961] A.C. 807.

³ See C. L. Stats., Ann. 81, 1964; *Hansard*, H.L., 1964, vol. 258, col. 42.

⁴ 14 and 15 Geo. V, c. 22.

⁵ [1929] A.C. 223.

⁶ At 230.

⁷ At 237.

⁸ All italics added.

However, in *Stag Line v. Foscolo, Mango & Co.*,¹ the House of Lords adopted a somewhat different approach in interpreting the expression 'reasonable deviation' in the same Act (Article IV, rule 4 of the Schedule). In this case Lord Atkin said:²

'For the purpose of uniformity it is . . . important that the courts should apply themselves to the consideration only of the words used without any predilection for the former law, *always preserving the right to say that words used in the English Language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.*'³

Lord Macmillan went still further in favour of uniformity:⁴

'It is desirable in the interest of uniformity that the interpretation of these rules should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance.'

His view was followed by Scott L.J. in *The Eurymedon*,⁵ who observed that 'the maintenance of uniformity in the interpretation of a rule of law . . . is . . . never easy to achieve. I do not, of course, suggest that we should judicially mould English law by reference to foreign practice; but that we should in a branch of law covered by international convention preserve uniformity is an obvious advantage, if it is judicially possible.' The guarded words⁶ of the learned judge may, however, be thought to detract somewhat from the principle he sought to lay down.

Again, the Carriage by Air Act 1932⁷ was a case of the verbatim incorporation of the Warsaw Convention in an English Statute: Section 1 laid down that 'the provisions . . . in the First Schedule to this Act shall . . . have the force of law in the United Kingdom'. In this instance, too, there was a division of opinion. In *Grein v. Imperial Airways Ltd.*⁸ the expression 'international carriage', an expression used in several articles of the Schedule to the Act, gave rise to a problem of interpretation in the Court of Appeal. Greer L.J. observed:⁹

'If there be any doubt or ambiguity in the language used the Statute should be so interpreted as to carry out the express and implied provisions of the convention.'

Greene L.J. talked of the Act as a 'uniform international code' and said that 'it is essential to approach it with a proper appreciation of this circumstance in mind'.¹⁰ However, in *Horabin v. B.O.A.C.*,¹¹ Barry J., interpreting 'wilful misconduct' in Schedule 1, Article 25 of the same Act, said:¹²

'You need not trouble about the latter phrase [wilful misconduct] because in the law

¹ [1932] A.C. 328.

² At 343.

³ All italics added.

⁴ At 350.

⁵ [1938] p. 41, at 61.

⁶ Namely: 'if it is judicially possible'.

⁷ 22 and 23 Geo. V, c. 36.

⁸ [1937] 1 K.B. 50.

⁹ At 66, 67.

¹⁰ At 76.

¹¹ [1952] 2 All E.R. 1016.

¹² At 1019.

of this country a default or an omission to do something can be just as much misconduct as the doing of something which is wrong.¹

In another case, *Stoeck v. Public Trustee*,² a problem arose over the incorporation of the Treaty of Peace Order into the Treaty of Peace Act 1919.³ Russell J. commented:⁴

'I apprehend it is the right of the litigant to assert before the courts of this country, and the duty of those courts to adjudicate upon, claims founded upon a consideration of the municipal law of this country, and *not the less so because the law involved has been derived from, and has been enacted for the purpose of giving effect to, certain provisions of a document of an international character.*'⁵

Academic writers have, in general, shown a tendency towards a purely English practice of interpretation. Dr. F. A. Mann has stated⁶ that the English courts tend to regard uniform legislation as a step in the development of English law, so that they incline towards applying English canons of construction, an approach which involves an attempt to construe the Statute in the light of earlier authorities. Shawcross and Beaumont's view is that the English courts should interpret a Statute based on an international convention in conformity with the foreign interpretation *without violating the English principles of interpretation*, but the tendency of the courts is towards applying the principles normally applicable to purely English Statutes.⁷ Samuels considers that that part of the Vienna Convention of 1961 which has become incorporated into English municipal law will be interpreted according to English rules of construction, although as far as possible it will not be interpreted so as to be inconsistent with international law.⁸

Section 1 of the Diplomatic Privileges Act creates, or draws attention to, another problem. It lays down that 'the following provisions of this Act shall, with respect to the matters dealt with therein, have effect in substitution for any previous enactment *or rule of law*'.⁹ The Act cannot strictly be called a codifying Statute because it does not enact much of the case law, nor does it enact English law as such. But codification is the

¹ It should be noticed that 'wilful misconduct' caused particular difficulty because in the original French text of the Convention the expression used was 'dol' which is considered in some contracting States as 'gross negligence'; in English law, 'wilful misconduct' and 'gross negligence' are mutually exclusive concepts. Shawcross and Beaumont (*Air Law* (2nd ed.), para. 364) are of the opinion that English courts will look at the meaning of this word which has previously been given by English courts, e.g. in: *Lewis v. G.W.R.*, [1877] 3 Q.B.D. 195; *Re City Equitable Fire Insurance Co. Ltd.*, [1925] Ch. 407.

² [1921] 2 Ch. 68.

³ 9 and 10 Geo. V, c. 33.

⁴ At 71.

⁵ Italics added.

⁶ 'The Interpretation of Uniform Statutes', *Law Quarterly Review*, 62 (1946), p. 278.

⁷ *Air Law* (2nd ed.), p. 84, para. 98.

⁸ *Modern Law Review*, 27 (1964), p. 693. See also *West Rand Gold Mining Co. v. R.*, [1905] 2 K.B. 391; *Collco Dealings Ltd. v. I.R.C.*, [1962] A.C. 1, at 19, *per* Lord Simonds.

⁹ Italics added.

nearest term that can be applied to it, especially with regard to the last three words of Section 1. In English law, a codifying Statute is interpreted in the light of previous decisions because it is those previous decisions which have, at least in part, resulted in the Act. Is this principle to be applied equally to the international rules embodied in the Schedule of the 1964 Act?

It seems necessary to distinguish between the Schedule, which sets out certain provisions of the Vienna Convention, and the main body of the Act, because it is the Schedule which raises problems of interpretation and of previous cases. With regard to the main body of the Act it would appear that the rules of construction are well settled. As James L.J. said in *Ex Parte Campbell*:¹

'Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts and the Legislature has repeated them without alteration in a subsequent Statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given them.'

This statement was quoted and approved by Viscount Buckmaster in *Barras v. Aberdeen Steam Trawling and Fishing Co.*,² who observed:

'It has long been a well-established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent Statute which incorporated the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it.'³

In the light of these statements and of the other cases already discussed, two main conclusions may be formulated regarding the interpretation of the 1964 Act:

- (i) The main body of the Act is subject to the ordinary rules of interpretation as applied by every English court of law.
- (ii) The weight of opinion is that despite the adoption of international rules into the municipal law of England, the ordinary canons of construction still apply so as to allow the courts to seek guidance from previous interpretations of the law they are applying, where the same or similar words are used.⁴

These conclusions must be borne in mind when considering the changes made in English law by the new Act; it is only by their application that one can assess the effect of the Act before the English courts pronounce upon it.

¹ [1870] L.R. 5 Ch. 703, at 706.

² [1933] A.C. 402, at 411.

³ See also *D'Emden v. Pedder* (1904), 1 C.L.R. 91 at 110 (Griffith C.J.); *Webb v. Outtrim*, [1907] A.C. 81 at 89 (Lord Halsbury L.C.); *Marshall v. Wilkinson*, [1943] 2 All E.R. 175; *The Royal Court Derby Porcelain Co. Ltd. v. Raymond Russell*, [1949] 2 K.B. 417 at 429 (Denning L.J.); *Paisner v. Goodrich*, [1955] 2 Q.B. 353 at 358 (Denning L.J.).

⁴ See *Empson v. Smith*, [1965] 3 W.L.R. 380.

The title of the Act states that this is 'an Act to amend the law on diplomatic privileges and immunities by giving effect to the Vienna Convention on Diplomatic Relations . . .' and, as has been stated, the first section provides that it shall have effect in substitution for any previous enactment or rule of law. This makes it clear that all other Statutes on the subject are repealed and that any problems which arise in future will be dealt with by reference to this Act only.

The Act, as indicated earlier, is a document in two parts. The first part is the body of the Act, comprising eight sections and its brevity is a result of the inclusion in the Statute itself, in the form of a Schedule, of those provisions of the Vienna Convention which Parliament intended to become part of English law. By no means every Article in the Vienna Convention is included in the Schedule, but only those for which specific legal provision was thought to be necessary in order to ensure their effectiveness in the United Kingdom.¹ Other countries which were parties to the Convention have used their own methods of incorporating such Articles as they thought fit into their Statute law, and it is unlikely that every country will include the identical provisions of the Convention in their legislation. This may not appear a perfect situation, but if almost one hundred countries were to incorporate more or less similar provisions into their national law, considerable progress would have been made in strengthening the legal safeguards of diplomatic intercourse. Section 2 provides that the Articles of the Vienna Convention set out in the Schedule to the Act shall have the force of law in the United Kingdom. The section also tackles the problem of terminology by stating the construction to be placed on certain terms, e.g. 'agent of the receiving State', a term hitherto unknown (at least formally) to English law. Section 3 enables the Queen to withdraw any privileges and immunities accorded to a foreign mission if reciprocal privileges accorded to the British mission in that State are of a lesser degree. Section 4 reiterates the usual rule in England, that the Foreign Secretary's certificate on any matter relating to a foreign agent's right to immunity shall be final. Consequential amendments to other Statutes and Orders in Council are dealt with in Sections 5 and 6. Special agreements or arrangements between the British Government and that of any other State are dealt with in Section 7; the section provides that in so far as any privileges and immunities in this country were extended by any such agreement or arrangement before the Act, they shall continue in force.

The Schedule reproduces eighteen Articles of the Vienna Convention, out of a total of fifty-three Articles, and the Articles not so reproduced are not made binding on the Courts as an integral part of English law. In fact

¹ The Schedule—Schedule 1 of the Act—sets out textually the provisions of Articles 1, 22-4 and 27-40 of the Vienna Convention of 1961.

almost all the Articles not included in the Schedule deal with administrative details or matters of practice and for the most part it would appear that they are not necessary or even relevant to the internal legal aspects of the subject, and would not require legislation in order to be given effect.

The substantive provisions of the Sections of the 1964 Act and of the Articles of the Vienna Convention incorporated in its Schedule will now be set out and examined seriatim under appropriate heads. For ease of reference the full text of the Act itself (but not of its Schedules), together with a list of the Articles of the Convention included in Schedule I of the Act, is printed as an Appendix to this article.¹ Unless otherwise stated, any mention of an Article in the following pages is to be understood as referring to an Article of the Vienna Convention of 1961 on Diplomatic Relations incorporated in the Schedule to the Act.

2. *Power to restrict Privileges and Immunities*

Section 3 of the Act, as already indicated above, provides:

‘If it appears to Her Majesty that the privileges and immunities accorded to a mission of Her Majesty in the territory of any State, or to persons connected with that mission, are less than those conferred by this Act on the mission of that State or on persons connected with that mission, Her Majesty may by an Order in Council withdraw such of the privileges and immunities so conferred from the mission of that State or from such persons connected with it as appears to Her Majesty to be proper.’

This section replaces the repealed Diplomatic Immunities Restriction Act 1955;² it continues in the new Act a provision giving effect to a suggestion made by the Somervell Committee on State Immunities in 1952,³ that Her Majesty’s Government should be invested with the power to reduce reciprocally the immunities of any foreign embassy in England to make them correspond with the immunities granted to British missions in the foreign State concerned. The need for this power had been accentuated by the restrictions applied to foreign diplomats in communist countries and the legitimacy of adopting reciprocal measures in such cases is expressly recognized in Article 47 of the Vienna Convention, which states that they are not to be regarded as a discrimination against the State concerned.

3. *Determination of Persons entitled to Privileges and Immunities*

Section 4 of the Act provides:

‘If in any proceedings any question arises whether or not any person is entitled to any privilege or immunity under this Act a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question shall be conclusive evidence of that fact.’

Prima facie, Section 4 means that, in so far as the certificate states ‘any fact relating to that question’, it is conclusive as to that fact. It may be

¹ See below, pp. 365 et seq.

² 4 and 5 Eliz. II, c. 21.

³ Cmnd. 8640, para. 12.

that these words open the door to determination of the relevant facts by the executive even wider than does the language of the House of Lords in *Engelke v. Musmann* in 1928.¹ In that case an action was brought against Herr Engelke in the High Court for arrears of rent alleged to be due under a lease. He entered a conditional appearance, but by affidavit claimed diplomatic immunity on the ground that he was consular secretary on the staff of the German Embassy, had been notified to the Foreign Office as such and that his name appeared in the diplomatic list issued by the Foreign Office. The plaintiff applied for leave to cross-examine Herr Engelke on the facts asserted in the affidavit, but the application was refused by the Master. On appeal, however, leave to cross-examine was granted by the Judge in Chambers and subsequently by the Court of Appeal,² the matter then being carried to the House of Lords. In the Court of Appeal the Attorney General had stated on the instructions of the Foreign Secretary that the defendant held the position he claimed and that he was recognized as such by the British Government. Scrutton L.J. declined to accept this statement as conclusive, as he thought that would be to substitute a department of the Government for the courts in a class of case where such substitution had never hitherto been recognized.³ It was accepted by the House of Lords that the sole point for determination was the method by which the status of any persons who claim diplomatic immunity is to be determined. Herr Engelke contended that the Attorney General's statement on the instructions of the Foreign Office was conclusive for this purpose, while the plaintiff maintained that any such dispute should be resolved in the ordinary way according to the usual rules of evidence. It is important to remember that the dispute related to the ascertainment of the appellant's *status*, not to whether or not he was entitled to immunity. The Attorney General admitted that 'such a statement as to his status is conclusive upon the question of diplomatic status alone; and it is still for the court to determine as a matter of law whether, the diplomatic status having been conclusively proved, immunity from process necessarily follows'.⁴ Great reliance was placed by the House of Lords on Lord Finlay's observations in *Duff Development Co. v. Kelantan Government*.⁵ Lord Buckmaster said that that case was a clear authority that the method of proving the status either of sovereigns or of the ambassadors who are their representatives was by a statement similar to that of the Attorney General in the instant case.⁶ In the *Duff Development Co.* case, Lord Finlay had said:

'It has long been settled that on any question of the status of any foreign power the proper course is that the Court should apply to His Majesty's Government, and that in any such matter it is bound to act on the information given to them through the

¹ [1928] A.C. 433.

² [1928] 1 K.B. 90.

³ *Ibid.*, at 116.

⁴ [1928] A.C. 433, at 436.

⁵ [1924] A.C. 797.

⁶ [1928] A.C. 433, at 442.

proper department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance.'¹

Applying this principle to the later case, the House of Lords held that the statement of the Attorney General, made at the instance of the Foreign Office, was conclusive evidence of the appellant's status. It followed that the latter was entitled to immunity under the Diplomatic Privileges Act 1708.² This decision makes it clear that the courts will rely on the certificate of the Foreign Secretary in so far as it relates to the *status* of the diplomat. But once the status is determined, it is for the court to decide whether he is entitled to immunity. In *Engelke v. Musmann*³ there was no dispute about the immunity because the status, once determined, spoke for itself. But in a pre-1964 case relating, say, to a domestic servant who had engaged in trade, the court would have enquired further into the question of immunity after the issue of the Foreign Secretary's certificate, having regard to Section 5 of the 1708 Act.⁴ The certificate would have stated that the defendant was a domestic servant in the employ of the X Embassy and it would have been for the court to decide whether he was entitled to immunity.

Section 4 may widen the power of the Foreign Secretary by stating that his certificate shall be conclusive in so far as it states 'any fact relating to that question' (i.e. the immunity of any person). The words 'any fact' may, it is thought, include the Minister's opinion on whether the person in question was entitled, in law, to immunity. For example, suppose that a clerk in the X Embassy is accused of a crime and immunity is claimed; suppose, too, that the Foreign Secretary issues a certificate to the effect that the clerk is on the administrative and technical staff of the X Embassy and is therefore entitled to immunity under Article 37 of the Schedule to the Diplomatic Privileges Act 1964.⁵ Might not this be effective within Section 4 as 'conclusive evidence of that fact', i.e. not only of his status but his immunity? Prima facie, it would seem that the borderline between this type of certificate and that envisaged in *Engelke v. Musmann*⁶ is very slight and Section 4 will, or can, enable it to be crossed. It is not suggested that the Foreign Office will do more than issue a certificate in pre-1964 terms, that is, stating that the person in question has been notified to the Foreign Secretary as a member of the diplomatic staff of a particular mission (or whatever he may be) and that he continues to be received as such. But if the form of certificate were to be changed, it might have larger legal consequences.

In this connection, it should perhaps be noticed that in England, as in most countries, the practice is for the heads of missions to send the Foreign

¹ [1924] A.C. 797, at 813.

⁴ 7 Anne, c. 12.

² 7 Anne, c. 12.

⁵ 1964, c. 81.

³ [1928] A.C. 433.

⁶ [1928] A.C. 433.

Secretary a full list of persons composing the staff of the mission for whom immunity is claimed. This is done annually at the beginning of each year, and the list is revised from time to time as changes are notified.¹

4. *Arrangements for the Extension of Privileges or Immunities*

Section 7 of the Act reads:

‘(1). Where any special agreement or arrangement between the Government of any State and the Government of the United Kingdom in force at the commencement of this Act provides for extending:

- (a) such immunity from jurisdiction and from arrest or detention, and such inviolability of residence, as are conferred by this Act on a diplomatic agent; or
- (b) such exemption from customs duties, taxes and related charges as is conferred by this Act in respect of articles for the personal use of a diplomatic agent;

to any class of person, or to articles for the personal use of any class of person, connected with the mission of that State, that immunity and inviolability or exemption shall so extend, so long as that agreement or arrangement continues in force.

‘(2). The Secretary of State shall publish in the London, Edinburgh and Belfast Gazettes a notice specifying the States with which and the classes of persons with respect to which such an agreement or arrangement as is mentioned in subsection (1) of this section is in force and whether its effect is as mentioned in paragraph (a) or paragraph (b) of that subsection, and shall whenever necessary amend the notice by a further such notice; and the notice shall be conclusive evidence of the agreement or arrangement and the classes of person with respect to which it is in force.’

This section has in view the continuation of existing agreements or arrangements with other States which extend the immunities granted in the Convention. Introducing the Diplomatic Privileges Bill in the House of Commons, Mr. Robert Mathew, then Under-Secretary of State for Foreign Affairs, pointed out that rather than include in the Bill a general power to make agreements going beyond the Convention, the Government had preferred to put in Section 7 a provision covering the continuance of two particular types of arrangement ‘which we simply cannot terminate unilaterally even should we wish to do so’.² Section 7 (1) (a) relates to the immunity from jurisdiction of subordinate staff, and provides that where they have the same immunity as a diplomatic agent by existing arrangement, such immunity is to continue. The Under-Secretary emphasized that these arrangements were very necessary on grounds of reciprocity. As it was essential that our representatives in certain countries must be fully protected, we must grant the like immunity here. There are in fact four missions whose administrative and technical staff, service staff, private servants and the wives and families of all those categories are protected to the same extent as the head of the mission and a diplomatic agent: Bulgaria, Czechoslovakia,

¹ Satow, *Guide to Diplomatic Practice* (4th ed.), p. 193.

² *Hansard*, H.C., 1964, vol. 697, cols. 1361–2.

Hungary and the U.S.S.R.¹ Despite appearances, reciprocity is not completely achieved by this provision. The four privileged countries do not allow British nationals to act in inferior and menial capacities in our embassies abroad while insisting that every member of the staffs of their embassies in England is a national of the sending State. The result, for example, is that there are twenty chauffeurs in these four missions in the United Kingdom, all of whom, together with their wives and families, receive complete protection and immunity, but such is not the case in our missions in those countries.

Section 7 (1) (b) provides that where any arrangement exists with another State that members of the staff of the mission shall have the same exemption from customs duties, taxes and related charges on articles for their personal use as diplomatic agents, it shall continue in force. Under this provision it is thus possible for members of the mission staff to continue to enjoy customs exemption throughout their tour of duty, not merely when they first take up their posts,² if previous arrangements had been made to this effect. In fact there were nine such agreements in force at the time of the passing of the Act, each of which gave these exemptions to members of the administrative and technical staff. The countries with whom such agreements had been concluded are Belgium, Bulgaria, France, Federal Republic of Germany, Indonesia, Luxembourg, Netherlands, Poland and the United States of America.³

It is important to note that Section 7 only gives effect to existing agreements or arrangements. That it does not contemplate the conclusion of further arrangements was stressed by the Under Secretary when he moved the second reading of the Bill:⁴ 'Indeed the Clause as drafted would not allow for new arrangements. It is merely a question of honouring those we already have.' But how far is this section a bar to the conclusion of further arrangements of the same kind? Article 47 of the Convention expressly provides that 'by custom or agreement States [may] extend to each other more favourable treatment than is required by the provisions of the present Convention'. But this Article is not one of those incorporated in the Schedule to the 1964 Act and, in consequence, it does not seem that there is anything in the Act to make any new 'arrangement' effective in English law.⁵ Accordingly, if litigation ever arose over a privilege or immunity in England granted in a new arrangement, it must be considered doubtful whether it would be sufficient to invoke Article 47 of the Convention and the new arrangement as a bar to the proceedings.

¹ See *London Gazette*, 2 October 1964 and 2 March 1965.

² See Article 27 and Article 36 (1).

³ See *London Gazette*, 2 October 1964.

⁴ *Hansard*, H.C., 1964, vol. 697, col. 1362.

⁵ *Inclusio unius exclusio alterius*.

5. *The Categories of Diplomatic Persons*

Article 1 of the Convention states:

'For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

- (a) The 'head of the mission' is the person charged by the sending State with the duty of acting in that capacity;
- (b) The 'members of the mission' are the head of the mission and the members of the staff of the mission;
- (c) The 'members of the staff of the mission' are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;
- (d) The 'members of the diplomatic staff' are the members of the staff of the mission having diplomatic rank;
- (e) A 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission;
- (f) The 'members of the administrative and technical staff' are the members of the staff of the mission employed in the administrative and technical service of the mission;
- (g) The 'members of the service staff' are the members of the staff of the mission in the domestic service of the mission;
- (h) A 'private servant' is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State;
- (i) The 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.'

These categories of diplomatic persons were previously unknown to English law in any formal sense. The categories specified in subparagraphs (a), (b), (d), (e) and (i) existed, but they had never been defined in any way. Those specified in subparagraphs (c), (f), (g) and (h) are entirely new; and, as will be seen, they have made the previous category of 'domestic servant' obsolete by dividing it into three new ranks of diplomatic person.¹ The effect of this change has yet to be seen, but one case has already occurred since the passing of the 1964 Act which shows that the courts will insist on a rigorous application of the new classifications. In *Empson v. Smith*,² a Canadian diplomat, who before the 1964 Act was simply 'a member of the official staff of the High Commissioner', was held to have become a member of the administrative and technical staff of the mission as from 1 October 1964, and in this new capacity he was found to have been deprived of his former immunity from civil jurisdiction. The category of 'private servants', it will be observed, is closely defined so as to leave little room for argument.

No less important is the careful definition of premises of the mission in subparagraph (i) which, *inter alia*, makes it clear that the residence of the head of the mission is to receive the same protection as the mission premises.

¹ See below, pp. 349 et seq.

² [1965] 3 W.L.R. 380.

6. *Inviolability of the Premises and Means of Transport of a Mission*

Article 22 of the Convention provides:

- '1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
- '2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
- '3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.'

The principle embodied in paragraph 1 of this Article has always been recognized in England, although never laid down in a Statute nor decided by a court. The one deviation was the case of *Gallatin's Coachman* in 1827.¹ Gallatin was the United States ambassador in London, and his coachman was arrested in the stable of the legation and charged with assault. The correspondence shows that the British Government upheld the action taken, while Mr. Gallatin, not unnaturally, took strong exception to it. The outcome of the case was that steps were taken by the British Government to ensure that no similar arrest of the servant of a foreign minister should in future take place without a previous communication being made to the minister, in order that the latter might be consulted as to the most convenient method of putting the warrant into execution. This indicates an intention by the Government to change its *practice* in similar cases rather than to refrain altogether from similar arrests. But no further reported arrests inside legations have been made since that notable incident. On the contrary, the case of *Sun Yat-Sen* in 1896 illustrates the British Government's caution in this respect. Sun Yat-Sen, a Chinese national and political refugee, was detained as a prisoner in the Chinese legation in London, with the apparent intention of transporting him to China. It was attempted to issue a writ of *habeas corpus* on his behalf, but the court refused. Wright J. endorsed on the affidavit:

'I hesitate to make any order, partly because I doubt the propriety of making any order or granting any summons against a foreign legation.'²

He considered that the matter was one for diplomatic proceedings.

Satow points out that this inviolability affords no justification for giving either shelter to criminals or asylum to political refugees.³ In such a case, he says, a government would be entitled to surround the mission premises with police for the purpose of preventing any escape and to insist on the recall of the diplomatic agent who was responsible for such action.

¹ Satow, *op. cit.*, p. 213.

² Mews' *Digest of English Case Law* (2nd ed., 1925), vol. 11, p. 306; Shortt and Mellor's *Practice of the Crown Office* (2nd ed.), p. 318.

³ Satow, *op. cit.*, pp. 214, 219.

Article 22 (2) also incorporates a principle that has been acted on by the authorities in the United Kingdom. It has not happened frequently that mission premises are damaged or their peace disturbed in this country. In the case of demonstrations outside mission premises in London, there is always a heavy police guard and anyone likely to violate Article 22 (2) is swiftly and unceremoniously removed.

The provision in paragraph 3 of the Article highlights what was already a serious problem before the Act was passed, namely, the consistent and careless parking of mission cars in places of obstruction without regard to traffic conditions. Parking tickets and summonses proved powerless to solve the difficulty because most missions claimed that they were immune from payment of such charges. The 'CD-plate' controversy was acute, fanned by such incidents as that of the Sergeant Clerk at the United States Embassy who successfully claimed immunity from proceedings in respect of a parking summons. Withdrawing the summons, the Chairman of the Bench at the Oxford Magistrates' Court commented: 'It is an abuse of privilege.'¹ In February 1964 Sir Harold Caccia, Permanent Under-Secretary for Foreign Affairs, wrote to the heads of diplomatic missions to tell them that police and traffic wardens had been told not to affix parking tickets to their cars, nor to tow them away.² This followed an incident in which the Malagasy ambassador protested to the Foreign Office after his car had been towed away from a position of obstruction. A leading article in the *Daily Express* described Sir Harold's move as 'an affront to the general public'.³ It was not long before the matter was discussed in Parliament. On 5 March 1964⁴ Lord Derwent, Minister of State at the Home Office, disclosed to the House of Lords that in 1963 2,078 parking and traffic proceedings against diplomats had been dropped. Paradoxically he observed that persons claiming diplomatic immunity were expected to observe traffic laws in exactly the same way as British citizens, adding: 'If there is danger or obstruction their cars can be removed.' The trouble resulted mainly from the use of embassy or High Commission cars and feeling became strong against the few missions who consistently and insistently demanded that their immunity should be respected. Many diplomats were reported to be in the habit of tearing parking tickets off their cars and either throwing them away or of going through the formality of returning ticket after ticket to the police with a polite note. But Sir Harold Caccia's letter must be taken to have stated authoritatively the pre-1964 legal position, and this position is endorsed and continued by Article 22 (3). The means of transport of the mission are now expressly said to be immune from 'requisition' and

¹ *Daily Express*, 22 February, 1964.

² *The Times*, 24 February 1964.

³ 25 February 1964.

⁴ *Hansard*, H.L., 1964, vol. 258, col. 36.

'attachment', terms which surely mean that in principle mission cars may not be towed away nor summonses be issued in respect of them.

7. *Exemption from Dues and Taxes*

Article 23 of the Convention provides:

- '1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
- '2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.'

Paragraph 1 means that the sending State and the head of the mission are exempt from paying dues and taxes such as 'rates', but not from paying electricity, gas or telephone charges. The position in England prior to 1964 was that, under a reciprocal arrangement proposed to heads of foreign missions in 1892, heads of missions were exempted from municipal rates leviable on the mission premises in respect of services not of direct benefit to them. Where this arrangement was accepted the British Government undertook to bear the charges for the poor relief rate, police rate, baths and washhouses, public libraries and museums, burial board and education. Certain charges could be recovered from members of the mission on application through the Foreign Office, for instance London County Council charges, street lighting, public sewers rate and general rate for repairing the streets under the Metropolitan Local Management Act.¹ It would appear that the charges recoverable before the 1964 Act have been swept away by Article 23 (1), which is quite unambiguous as to the comprehensive character of the exemption.

Article 23 (2), however, ensures that anyone letting premises for use by a mission will not get paragraph (1) exemption. Prior to 1964 in English law there was equally no such exemption, because in any action brought against a lessor of mission premises the defence of diplomatic immunity did not cover him. On this point, therefore, paragraph 2 does not represent any change in domestic law or practice.

8. *Inviolability of Archives and Documents*

Article 24 of the Convention states:

'The archives and documents of the mission shall be inviolable at any time and wherever they may be.'

The Article lays down a rule which does not seem previously to have found expression in English law. There have not been any English cases directly

¹ Satow, *op. cit.*, pp. 233-4.

in point and the case of *R. v. AB*.¹ is the only one which throws any light on the pre-1964 position. The appellant in that case, a code clerk at the United States Embassy in London, had extracted documents from the embassy archives. Having been dismissed by the ambassador, he was immediately arrested by the United Kingdom police on charges under the Official Secrets Acts. When he claimed, *inter alia*, that these did not apply to acts committed by a diplomatic agent in respect of documents of the diplomatic mission in which he was employed, the Court of Criminal Appeal held that the provisions under which he was charged were 'capable of applying to the circumstances of this case just as much as if he had obtained a document from a department of the Government in this country'.² This pronouncement has, however, to be read in the light of the fact that the United States Government had expressly waived its immunity with respect to the appellant for the purposes of the case. It cannot therefore be understood as denying the inviolability of the archives of the United States Government.

9. *Freedom of Communications*

Article 27 of the Convention provides:

- '1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.
- '2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
- '3. The diplomatic bag shall not be opened or detained.
- '4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.
- '5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
- '6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5 of this Article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.
- '7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorised port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.'

¹ [1941] 1 K.B. 454.

² *Ibid.*, at 461.

Except on one point, this Article is in complete accord with pre-1964 English practice, which conformed to international law in recognizing the necessity for the inviolability of mission correspondence and of the diplomatic bag, and the immunity of the marked and identifiable courier. Oppenheim put it concisely:

'To ensure the safety and secrecy of the diplomatic despatches they bear, couriers must be granted exemption from civil and criminal jurisdiction, and afforded special protection during the exercise of their office. It is therefore usual to provide them with special passports. It is particularly important to observe that . . . those parts of their baggage which contain diplomatic despatches, and are sealed with the official seal, must not be opened and searched.'¹

The point on which the Article diverges from the previous practice is the proviso in paragraph 1 that the mission may install and use a wireless transmitter only with the consent of the receiving State. As the United Kingdom delegate pointed out at the Vienna Conference when this Article was under discussion,² it had never been the practice of the British Government to insist that its permission be obtained before such installation took place, and the proviso was added to paragraph 1 in the face of persistent opposition by the United Kingdom at the Vienna Conference (as indeed also of the United States and Soviet Union).

Article 28 of the Convention provides:

'The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.'

This is the enactment of an already well-established rule of practice in England and needs no further comment.

10. *Immunities and Privileges of a Diplomatic Agent*

The immunities and privileges of diplomatic agents are governed by the provisions of Articles 29–36 of the Convention. Article 29 first states:

'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.'

This Article is closely linked with Article 31³ which accords a diplomatic agent immunity from the criminal jurisdiction of the receiving State. Together, the two Articles ensure that he cannot be made to suffer any kind of criminal process, because even if Article 31 could be circumvented, Article 29 requires that his person should be inviolable and immune from arrest. Before 1964 this rule was rigorously observed, the one well-known exception being the case of Count Gyllenborg in 1716. When Swedish

¹ Oppenheim, *International Law* (8th ed.), vol. 1, para. 405.

² U.N. Doc. A/CONF. 20/14, pp. 157, 158.

³ See below, p. 338.

Minister in London, the Count plotted with leading Jacobites to depose George I. He was arrested and detained, despite diplomatic protests, and eventually exchanged for the British Minister in Stockholm who had been arrested as a counter-measure.

Article 30 next provides:

- '1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.'

This, too, reflects the previous English practice. Inviolability has always attached to the house of a diplomatic agent, whether owned by himself or his Government or merely rented.¹ Satow observed that no officer of State, and in particular no police officer, tax-collector or officer of a court of law, can enter the residence of a diplomat or, without the latter's consent, discharge any function therein.²

Article 31 adds:

- '1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
 - (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
 - (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
 - (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
- '2. A diplomatic agent is not obliged to give evidence as a witness.
- '3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measure concerned can be taken without infringing the inviolability of his person or of his residence.
- '4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.'

The opening sentence of the Article raises the question whether the diplomatic agent's immunity from criminal jurisdiction, recognized in the Vienna Convention, was already part of English law prior to the 1964 Act. Section 3 of the Diplomatic Privileges Act 1708³ had formerly laid down that 'all writs and processes that shall at any time here-after be sued forth or prosecuted whereby the person of any ambassador or other public minister . . . of the domestic or domestic servant may be arrested or imprisoned or his or their goods or chattels may be distrained seized or attached shall be

¹ Hurst, 'Les immunités diplomatiques' *Recueil des cours* (1926-II), pp. 131, 162.

² Satow, *op. cit.*, p. 213.

³ 7 Anne, c. 12.

... utterly null and void'. The Act of Anne was passed after M. Matteuof, the Russian ambassador, had been arrested for civil debts by a number of his creditors;¹ and ever since writers have debated whether the Act granted immunity from criminal as well as civil jurisdiction. The preamble to the Act did not indicate that it was passed for any purpose other than to ensure that the Matteuof incident could not occur again. But it did speak of 'processes' that may be 'prosecuted' whereby a diplomat might be 'arrested or imprisoned'; this language does not evoke only civil proceedings, unless the words are interpreted restrictively in the context of the Matteuof affair. On the other hand, in the early eighteenth century civil arrest for debt was not uncommon, and all the terms which nowadays would imply criminal proceedings might be used in that context. The words of the Act can hardly therefore be regarded as a clear guide to the intention of Parliament on this point.

Most writers took the view that in international law the immunity extended to criminal jurisdiction. Phillimore was of this opinion, citing, *inter alia*, the cases of Mendoza, who plotted to depose Queen Elizabeth I and was ordered to leave the country, and of L'Aubespine, a French ambassador who also plotted against her, and another French ambassador, de Bass, who conspired to kill Cromwell in 1654 and who was ordered to leave the country within twenty-four hours.² Hyde, citing verbatim the United States Instructions to Diplomatic Officers, stated: 'A diplomatic representative possesses immunity from the criminal and civil jurisdiction of the country of his sojourn, and cannot be sued, arrested or punished by the law of that country.'³ Oppenheim too said that 'the receiving States have no right, in any circumstances whatever, to prosecute and punish diplomatic envoys';⁴ he considered that a diplomat who violated the law of the receiving State must be recalled or sent home immediately. Sir Cecil Hurst, in his Hague Academy lectures, strongly affirmed the correctness of this view, going so far as to say: 'No single precedent exists in which, without his own consent, a foreign diplomatic agent has been subjected to the criminal jurisdiction of the country in which he is stationed.'⁵

Early writers on English law did not always agree with international doctrine on this topic. Coke thought that ambassadors could be punished if they committed crimes against 'the law of reason or nature'⁶ and Hale agreed with this exposition.⁷ Foster observed that:

¹ See *Matteuof's case* (1709), 10 Mod. Rep. 4.

² Phillimore, *Commentaries upon International Law* (3rd ed.), vol. 2, paras. 160-5.

³ *International Law Chiefly as Interpreted and Applied by the United States*, vol. 2, p. 1266.

⁴ Oppenheim, *op. cit.*, p. 790.

⁵ *International Law: Collected Papers* (1950), Chap. 15.

⁶ Coke, 4th Inst. 153.

⁷ *Pleas of the Crown* (1736), vol. 1, pp. 95 et seq.

'For murder and other offences of great enormity, which are against the light of nature and the fundamental laws of all society, the persons mentioned in this section [ambassadors] are certainly liable to answer in the ordinary course of justice, as other persons offending in the like manner are.'¹

In 1717 Count Gyllenborg, the Swedish ambassador at the Court of George I, conspired to dethrone the King, and was arrested and his papers searched before he was sent home. It is true that no action was brought against him, but the very arrest and search, although explained away by international authorities as a measure of self-defence, was a considerable interference with the ambassador's inviolability. However, the 1708 Act was certainly not regarded as having bestowed immunity from criminal jurisdiction on ambassadors' servants, as is shown by the case of Gallatin's coachman. The coachman, who was in the service of Gallatin, the United States ambassador, committed an assault outside the mission. He was arrested actually inside the mission and charged with a criminal offence.²

D. C. Holland, discussing the fact that international writers usually say that persons with diplomatic status are exempt from criminal jurisdiction, observes that there is 'not a single judicial decision in English law which can be regarded as laying down that proposition'. But he considers that there is no case in which a foreign diplomatic agent has been subjected to criminal liability in this country, except where his Government has waived immunity on his behalf.³ His conclusion is that this question is not decided by the courts but by the Executive, who decide whether or not to institute criminal proceedings. In fact, if the Executive had instituted proceedings, it is probable that the cumulative effect of the opinions of international jurists, the decisions that imply that international law is part of the common law, and the natural meaning of the words of Section 3 of the 1708 Act⁴ would have led the courts to hold that there was complete immunity from criminal process. Apart from the instances already mentioned, there was authority to support these propositions. In *R. v. Owen* (alias Collins),⁵ the Attorney General stated that 'by the law of nations if an ambassador compass and intend death to the person of the King in whose land he is, he may be condemned and executed for treason; but if he commit any other treason than this, it is otherwise: then he should be sent to his own country'.

In the light of the legal opinion and the cases, it is impossible to reach a definite conclusion as to whether or not the 1708 Act conferred complete immunity from criminal jurisdiction on a diplomatic agent. According to

¹ *Discourses* (1762), No. 1, p. 188.

² Hall, *International Law* (8th ed.), pp. 229, 231; Moore, *Digest*, vol. 4, pp. 656, 657.

³ *Current Legal Problems* (1951), p. 81, at p. 96; see also *R. v. A.B.*, [1941] 1 K.B. 454.

⁴ 7 Anne, c. 12.

⁵ (1615), 2 St. Tr., p. 879; see also *Taylor v. Best* (1854), 14 C.B. 487, where Jervis C.J. observed that 'an ambassador . . . is privileged . . . from being proceeded against in a manner which may ultimately result in the coercion of his person'.

international jurists the Act *should* have had this effect, but in English law the point must be considered as having been at least doubtful. The doubt is further emphasized by two English cases. In *R. v. Guerchy*¹ the French ambassador was indicted for employing a man to murder another Frenchman but, before he could stand trial, a *nolle prosequi* was entered. Sir Cecil Hurst argued that this showed that a diplomat was exempt from criminal proceedings;² Holland, on the other hand, thought that it went no further than to show that the Executive considered it impolitic to proceed with the prosecution.³ The report does not make the position clear as no judgment was given. There is some basis, in view of the English authorities, for favouring Holland's opinion. Indeed it is possible to suggest that the existence of a liability to prosecution is the reason behind the practice of 'recall' to avoid prosecution. One thing is quite clear: the 1708 Act has seldom been invoked to show the diplomat's criminal immunity, nor did any of the international writers suggest that in England the position was covered by this Act. In *R. v. AB*,⁴ Lord Caldecot C.J. refused to decide the point:

'I find it unnecessary to decide whether or not the diplomatic privilege of the character discussed before us can be claimed . . . in connection with a criminal charge.'⁵

Russell pointed out that there is no recorded case of a prosecution for breach of the 1708 Act, so that it is undetermined whether 'writ or process' extends to criminal proceedings.⁶ This may be because it is assumed by the Foreign Office that the inviolability does extend this far, so that the question of whether or not to institute proceedings is never considered. Holdsworth's view was that Section 3 of the 1708 Act conferred immunity from civil jurisdiction only.⁷ A recent case may, however, have clarified the pre-1964 position to some extent. In *R. v. Madan*⁸ the appellant, a person entitled to diplomatic immunity, appealed against his conviction for the criminal offence of obtaining a season ticket and money by false pretences. Lord Parker L.C.J. admitted to difficulty in deciding, *inter alia*, whether the appellant was entitled to immunity from criminal jurisdiction by virtue of the 1708 Act and he referred to *R. v. AB*,⁹ in which the court expressly left that question open. In view of the Attorney General's failure to elicit any helpful principle from the earlier cases, the Lord Chief Justice concluded:

'When one is dealing with something, as in this case, which is *malum prohibitum*, this court takes the view that in a case such as this there is no distinction to be drawn between the principle of law applicable in the case of civil proceedings and criminal charges.'¹⁰

¹ (1765), 1 Wm. Bl. 545.

² Op. cit., p. 225.

³ D.C. Holland, op. cit., at p. 97.

⁴ [1941] 1 K.B. 454.

⁵ At 457.

⁶ *Crime* (12th ed.), p. 127.

⁷ *H.E.L.*, vol. 10, p. 370; see also Adair, *The Extraterritoriality of Ambassadors in the 16th and 17th Centuries* (1929), pp. 88-9.

⁸ [1961] 2 Q.B. 1.

⁹ [1941] 1 K.B. 454; see above, p. 336.

¹⁰ [1961] 2 Q.B. 9.

This case at least established that where a crime is *malum prohibitum*, it will render the author immune from criminal prosecution. It follows that crimes *malum in se* were not considered by the Lord Chief Justice to fall into the same category, and their position before the 1964 Act was thus a little anomalous. It is to be regretted that the court saw fit to perpetuate the archaic distinction between the two '*malums*',¹ although the question is now of academic interest only, as all crimes *malum in se* are today covered by Statute. But the case at least established that the 1708 Act conferred immunity from criminal proceedings in respect of crimes constituting *malum prohibitum*. To that extent, it is clear that the 1964 Act does not effect a change in English law.

Article 31 (1) (a), (b) and (c) do introduce provisions new in English law. By subparagraphs (a) and (b) immunity from civil jurisdiction does not now exempt a diplomatic agent from any action relating to private immovable property situated in the receiving State or to questions of succession in which he is involved in his private capacity. Subparagraph (a) is in direct conflict with the English decision of *Parkinson v. Potter*,² in which it was established that an attaché at a foreign embassy was not liable to pay rates on his private residence. In that case a Portuguese attaché who was assignee of a lease which contained a covenant to pay rates was held immune from such payment.³

Subparagraph (c), by negating a diplomatic agent's immunity from civil proceedings in any action relating to professional or commercial activity outside his official functions, sets aside the existing English case-law on the subject. Section 5 of the 1708 Act⁴ provided that no trader who was in the service of an ambassador or public minister might take the benefit of the Act, but said nothing as to the trading activities of the ambassador or minister himself. There are several cases on this point after the 1708 Act was passed, in which it was sought to establish that a diplomatic agent was unable to claim the benefit of the Act in the same way as a servant could not. In *Taylor v. Best*,⁵ the First Secretary of the Belgian Legation, who was acting as chargé d'affaires in the ambassador's absence, was accused of commercial activities. Jervis C.J. observed that the privilege attaching to an ambassador or public minister was not forfeited if he engaged in trade; in his opinion, Section 5 of the 1708 Act applied only to his servants.⁶ Again, in *Re Republic of Bolivia Exploration Syndicate Ltd.*,⁷ a Second Secretary in the Peruvian Legation was accorded immunity in respect of proceedings against him for misfeasance as a director of the Company. This view of the law was upheld by Scrutton L.J., in *The Porto Alexandre*,⁸ who said that 'an

¹ See Bowett in this *Year Book*, 37 (1961), pp. 549 et seq.

² [1885] 16 Q.B.D. 152.

³ For further discussion of this case see below, p. 345.

⁴ 7 Anne, c. 12.

⁵ (1854), 14 C.B. 487.

⁶ *Ibid.*, at 519.

⁷ [1914] 1 Ch. 139.

⁸ [1920] p. 30, at p. 37.

ambassador . . . of the sovereign may engage in private trading, but . . . his immunity . . . protects him even from proceedings in respect of his private trading'. It is clear from these cases that English law did not prevent an ambassador from claiming immunity in respect of commercial activities, even if they were exercised outside his official functions. The original reason given by Talbot C.J. in *Barbuit's* case,¹ was that 'trade is a matter of State, and of a public nature, and consequently a proper subject for the employment of an ambassador'. As Barbuit's trade was that of a tallow-chandler, the statement was somewhat extraordinary, but since 1964 the problem has disappeared and the old case law is no longer valid.

It will be observed that there is nothing in subparagraphs (a), (b) or (c) to lift the immunity from civil jurisdiction of a diplomatic agent in the case of road accidents and, in the opinion of Samuels, this much reduces their importance.²

Article 31 (2) incorporates a rule well established in this country, as in many others. The provision in Article 31 (3) which lays down that measures of execution taken to enforce judgments obtained against a diplomatic agent by virtue of subparagraphs (a), (b) and (c) may not be taken if they will infringe the inviolability of his person or his residence, like that contained in Article 32 (4), seems, in practice, to defeat the purpose of the exemptions from immunity. One can see the necessity for it in that the exemptions might defeat the general principle of inviolability if such a provision were not included. But in practice it must mean that almost any type of execution will be impossible to achieve.

Article 33 of the Convention reads:

'1. Subject to the provisions of paragraph 3 of this Article a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.

'2. The exemption provided for in paragraph 1 of this Article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition:

- (a) that they are not nationals of or permanently resident in the receiving State; and
- (b) that they are covered by the social security provisions which may be in force in the sending State or a third State.

'3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

'4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.

'5. The provisions of this Article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.'

¹ (1737), Talbot, 281.

² (1964), 27 M.L.R. 689.

The provisions of this Article have to be read in the light of Section 2 (4) of the Act, which states:

'The exemption granted by Article 33 with respect to any services shall be deemed to except those services from any class of employment which is insurable employment, or in respect of which contributions are required to be paid, under the National Insurance (Industrial Injuries) Acts 1946 to 1964, the National Insurance Acts 1946 to 1964, any enactment for the time being in force amending any of those Acts, or any corresponding enactment of the Parliament of Northern Ireland, but not so as to render any person liable to any contribution which he would not be required to pay if those services were not so excepted.'

None of the above provisions changes any rule of law or practice in force in England prior to the 1964 Act. Two points in the Article are, however, worth noting: first, the obligation placed on the diplomatic agent by paragraph 3 to observe the regulations in force in the receiving State in so far as they apply to his non-exempt employees; secondly, the provision in paragraph 5 expressly allowing the conclusion of bilateral or multilateral agreements between States either prior to the Act or in future, on this subject.

Article 34 confirms that a diplomatic agent is exempt from all dues and taxes, personal or real, national, regional or municipal, with six exceptions set out in successive paragraphs of the Article, as follows:

- (a) 'Indirect taxes of a kind which are normally incorporated in the price of goods or services.'

This is an endorsement of a practice already existing in almost all countries, the United Kingdom included. It means that the diplomatic agent must pay normal prices on goods he buys here, thereby in fact paying purchase tax, import duty or any other kind of indirect tax that is incorporated in the price.

- (b) 'Dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purpose of the mission.'

This exception largely incorporates the practice followed in the United Kingdom before 1964: where property was occupied by a diplomatic agent for the purpose of the mission, he was treated as exempt from any charge to Income Tax Schedule B in respect of the profits of occupation, and also, if he owned the property, from Income Tax Schedule A in respect of profits of ownership.¹ Otherwise, he was liable for such dues and taxes as might become payable on any property occupied for his own purposes, for example, his private residence.

But if this paragraph incorporates rates as 'dues and taxes' as it seems reasonable to presume, the Article does change the former practice. On this matter there was judicial authority to the effect that a diplomatic agent is

¹ Satow, *op. cit.*, p. 232.

not liable for the rates payable on his private residence.¹ This was established in *Parkinson v. Potter*,² in which the assignee of a lease refused to comply with a covenant in the lease to pay rates on the ground that he was exempt as attaché to the Portuguese Embassy. Consequently the lessor paid the rates and sued the original lessee (assignor) for reimbursement on the ground of breach of covenant. The original lessee set up the attaché's immunity as a defence, claiming that the breach was that of his assignee, the attaché, and that he (the assignor) could not be held liable. In the Court of Appeal, Wills J. concluded that 'he [the attaché] was not liable to pay the rates assessed upon him in respect of his occupation'.³ He also concluded that the defendant lessee remained liable to the lessor under the covenant. It would appear that this decision is no longer valid⁴ despite the fact that it was based not on the question of rates, but on the attaché's inherent immunity from process.

- (c) 'Estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39.'

This exception accords with previous British practice, subject to the proviso in Article 39 that such duties shall not be levied on movable property which was in the receiving State solely as a consequence of the presence there—in his official capacity—of a member of the mission, since deceased.

- (d) 'Dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State.'

This paragraph differs from the previous English practice only on one point. Assuming 'private income' to include income from investments, Section 119 of the Income Tax Act 1952⁵ allows heads of missions exemption from tax on any interest or dividends received by virtue of investments made in England.⁶ Applying the rules relating to interpretation of Statutes, it can be seen that where a later Act is inconsistent with an earlier Act, the later Act impliedly repeals the earlier one *pro tanto*.⁷ But the presumption is against the implied repeal of an earlier Act and therefore two apparently inconsistent Acts must be reconciled if logically possible.⁸ In particular, one can apply the maxim *generalia specialibus non derogant*,⁹ which means that

¹ By virtue of his own immunity, not because he held it for the purposes of the mission.

² [1885] 16 Q.B.D. 152.

³ *Ibid.*, at 162.

⁴ For another view of this case see above, p. 342.

⁵ 15 and 16 Geo. VI, and 1 Eliz. II, c. 10.

⁶ 'No tax shall be chargeable in respect of the stock, dividends or interest of any accredited Minister of any foreign State resident in the United Kingdom.'

⁷ *Vauxhall Estates Ltd. v. Liverpool Corporation*, [1932] 1 K.B. 733.

⁸ *Ellen Street Estates v. Minister of Health*, [1934] K.B. 590.

⁹ *Per* Lord Selborne L.C. in *Seward v. Vera Cruz*, [1884] 10 App. Cas. 59, 68.

a special Act is not impliedly repealed by a general Act. It would appear likely that the application of this maxim will 'save' the provision in Section 119 of the Income Tax Act 1952¹ because that is specific whereas the stipulation in this article is more general.

(e) 'Charges levied for specific services rendered.'

This exception, too, is in accordance with British practice.

(f) 'Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.'

This paragraph relates to charges payable in the case of an action relating to immovable property which can be the subject of such action by virtue of Article 31.² The effect of the proviso referring to Article 23 is that no such charges can be levied on the premises of the mission.

Article 35 of the Convention states:

'The receiving State shall exempt diplomatic agents from all personal services, from all public services of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.'

This article is in complete accord with previous British practice.

Article 36 of the Convention states:

'1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

(a) articles for the official use of the mission;

(b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.

'2. The personal baggage of a diplomatic agent shall be exempt from inspection unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.'

Both the provisions in paragraph 1 were observed as a matter of practice before the 1964 Act; articles for the official use of the mission have always been admitted without examination.³ Paragraph 2 is a new provision. The words 'unless there are serious grounds for presuming' gave rise to comment in the House of Commons in the debate on the second reading of the Diplomatic Privileges Bill. Commander Courtney claimed that the introduction of this qualification on the diplomat's immunity showed that modern theory was catching up with practice⁴ and Mr. Edward Gardner expressed relief that Customs Officers were given the power to open the agent's baggage in the circumstances described.⁵ The previous practice was that

¹ 15 and 16 Geo. VI, and 1 Eliz. II, c. 10.

³ Satow, *op. cit.*, p. 230.

⁴ *Hansard*, H.C., 1964, vol. 697, col. 1374.

² See above, p. 338.

⁵ *Ibid.*

diplomatic agents were exempted from examination of their baggage on first arrival and on subsequent arrivals too, if a baggage pass¹ was produced.

11. Immunities and Privileges of other Categories of Persons connected with the Mission

Article 37 of the Convention provides:

'1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.

'2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.

'3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.

'4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.'

Article 37 is perhaps the most important Article for the purposes of comparison with the pre-1964 law, because it defines how far the immunities of each 'class' of diplomatic persons extend.

Under pre-1964 law, 'members of the family' probably consisted of the envoy's wife and children living with him under his roof.² It may even have extended to wives living apart from their envoy husbands.³ Certainly the privilege covered the families described in paragraphs 1 and 2 of this Article. In this respect, therefore, little change can be seen. But is the present position satisfactory? It will be recalled that there was considerable discussion at the Vienna Conference as to whether a definition of members of the family should be included, and it was eventually decided not to include such a definition. Consequently, in England at least, one is thrown back on the somewhat unsatisfactory case law to attempt to determine who is a member of the family for the purposes of protection. Unfortunately the

¹ This was obtained from the Foreign Office, for use when returning to this country from abroad.

² D. C. Holland, *op. cit.*, p. 101.

³ *MacNaghten v. Coverdias*, *Annual Practice* (1923), vol. 1.

cases are few and far between. In the earliest case, *Don Pantaleon Sa*,¹ the brother of the Portuguese ambassador was concerned in a riot in London and was later charged with murder. He was arrested, tried and executed despite a plea of immunity based on his brother's alleged right and his own. It was held, rejecting his claim to privilege in his own right, that he could not claim immunity derived from his relation to his brother by virtue only of his residence here. Despite this decision, Oppenheim thought that 'other relatives of the envoy' are completely privileged so long as they live under his roof, but he could not cite an English case in support of this contention.² The case of *Ghikis v. Musurus*³ established the wife's right to immunity. In that case it was held that a wife who resided with her husband (the ambassador) at the embassy was not 'ordinarily resident within the jurisdiction' for the purposes of R.S.C. Order 11 Rule 1 (c) so as to be served with notice of a writ outside the jurisdiction after she had left. Lord Phillimore in *Engelke v. Musmann*⁴ observed that 'the ambassador further requires . . . that there should be a like immunity for his personal family, that is to say, his wife and children if living with him'. Following this dictum, Harman J. in *In re C* (an infant)⁵ allowed a father's plea of immunity on behalf of his fifteen-year-old son so as to deprive the court of the power to make him a ward of court. This case is important in that it seems to take a broad view of the requirement that, to constitute a member of the family, a person must form part of the envoy's household. The dispute was over a Greek child whose education had been financed by his English stepmother. She was separated from her husband, employed at the Greek Embassy, who in 1956 wanted to send the boy to Greece, at his expense, for further education. The wife applied to make the boy a ward of court but Harman J. found himself unable to comply with her request. Expressing himself as following Lord Phillimore,⁶ he said that if the boy were 'under his father's control' he would be entitled to immunity. It is suggested that the learned judge's words are particularly important because they open the door to a number of possibilities: 'The question is whether he has so far surrendered his parental rights as not to be able to claim that the boy is a member, for this purpose, of his family and, looking at it generally, I do not think I can come to the conclusion that he has so surrendered his parental rights.'⁷ He further observed that the stepmother's wishes would not weigh very heavily 'unless the father has abandoned his right'.⁸ From these observations it seems clear that Harman J., at least, did not think it necessary that a child must live with his father to gain his immunity; indeed he went so far as to

¹ (1654), 5 St. Tr. p. 462.

² Oppenheim, op. cit., p. 812.

³ (1909), 25 T.L.R. p. 225.

⁴ [1928] A.C. 433, 450.

⁵ [1958] 3 W.L.R. 309.

⁶ In *Engelke v. Musmann*, [1928] A.C. 433, at 450.

⁷ [1958] 3 W.L.R. 309, at 312.

⁸ Ibid.

imply that nothing short of the father's abandonment of his rights in respect of the child would serve to remove the immunity.

Thus, before the new Act the position seems to have been that wives and children, at least, were entitled to the same immunities as the diplomat himself. The new Article 36 expresses this immunity as extending to members of the family 'forming part of his household'. Can one not reasonably presume that this phrase would not necessitate their living with him and that it would cover not only the facts in *In re C*¹ but also, probably, those in *Don Pantaleon Sa*?² Indeed it may go further than any case in the English courts. As Mr. Leslie Hale observed in the Commons debate on the second reading of the Diplomatic Privileges Bill: 'They [the courts] have not had to deal with the question of Mohammedan ambassadors to know how many wives and how many children are protected.'³ He went on to suggest that everyone in those categories would get protection under this Article: 'As I understand the Clause, it extends to any relative who is living with him and, strangely enough, not to a relative who is not living with him.' With respect, it is suggested that this interpretation is not correct. One cannot categorically lay down how the phrase 'forming part of his household' will be interpreted by the courts, but it would appear to be open to a wider interpretation than 'members of the family living with him', because a member of the family can form part of the household while many miles away.

Paragraph 2 of Article 37 says of the administrative and technical staff of the mission that, although they are to receive the same immunity from criminal jurisdiction as a diplomatic agent, they are not to have immunity from the civil and administrative jurisdiction in respect of their acts performed outside the course of their duties. Under paragraph 3, in the case of both criminal and civil jurisdiction, the service staff of the mission are to have immunity only in so far as their acts were performed in the course of their duties. Finally, under paragraph 4, private servants of members of a mission are accorded no immunities as of right other than the exemption of their emoluments from taxation. Whether they receive any other immunities or privileges is at the discretion of the receiving State. The limitations here placed on immunities of these three categories of staff constitute, as will now be shown, not only changes in the existing law but significant reductions in the immunities hitherto accorded under our law.

The members of the administrative and technical staff comprise clerks, secretaries, communications and wireless operators, translators, archivists, press and cultural representatives and any other persons falling into like categories. The members of the service staff include domestic servants,

¹ [1958] 3 W.L.R. 309.

³ *Hansard*, H.C., 1964, vol. 697, col. 1384.

² (1654), 5 St. Tr. p. 462.

cooks, cleaners, porters and chauffeurs. Private servants, who under paragraph 4 receive no immunity at all as of right,¹ comprise domestic servants of a member of the mission who are not employees of the sending State. These three categories were unknown in England before 1964 and it is not easy to find any parallel categories expressed in any case or Statute. Section 3 of the Diplomatic Privileges Act 1708² laid down that not only was an ambassador protected from any 'writ or process', but also 'the domestick or domestick servant of any such ambassador'. The 1708 Act provided for two categories only to enjoy immunity: the ambassador and his domestic servant. It is hardly surprising, therefore, that the courts attempted to include many persons other than true 'domestic servants' within its ambit. Prima facie, the import of Section 3 was that all the grades of diplomat between an ambassador and a domestic servant were unprotected by the Statute. The courts soon remedied any such narrow construction. In *Hopkins v. De Robeck*,³ Buller J., holding that the Swedish ambassador's secretary was entitled to immunity under Section 3, observed that 'the Statute of Anne is only explanatory of the law of nations; and the words 'domestic or domestic servant' are only put by way of example'.⁴ Mathew J. approved this dictum in *Parkinson v. Potter*,⁵ and at least one other authority supports the opinion that the reference to 'domestic servant' was put into Section 3 by way of example only and that the privilege extended to everyone associated in the performance of embassy duties.⁶ Certainly Section 3 has been construed to protect all the categories of diplomatic staff which the Vienna Convention has defined, and they all received the same measure of protection under the 1708 Statute, viz. complete immunity from civil proceedings. In the cases arising under that section, the dispute was on one point only: was the defendant a domestic servant so as to be entitled to the protection it conferred?

The salient points emerging from the many cases on this issue were that a domestic servant need not reside or lodge in the ambassador's house,⁷ but he must be employed 'in or about the house only',⁸ that if he claimed Section 3 immunity he must submit an affidavit describing the specific tasks that he was hired to do and did, in fact, perform,⁹ and that persons could not avail

¹ See, however, the *London Gazette* of 2 October 1964 which sets out the four countries whose private servants receive the same immunities as a diplomatic agent, pursuant to Section 7 (1) (a).

² 7 Anne, c. 12.

³ (1789), 3 T.R. 79.

⁴ *Ibid.*, at 80.

⁵ [1885] 16 Q.B.D. 152, 157.

⁶ Halsbury's *Laws of England*, vol. 7, p. 273; it is interesting to note the observation of the Somervell Committee on State Immunity, paragraph 10, that some States, including the U.S.S.R., do not grant immunity to servants of any nationality.

⁷ *Evans v. Higgs* (1728), 2 Stra. 797; *Wigmore v. Alvarez* (1731), FitzGibbon, 200; *Malachi Carolino's case* (1744), 1 Wils. 78; *Re Haslang* (1755), Dickens, 274.

⁸ *Toms v. Hammond* (1733), Barnes 370; this decision is inconsistent with several later cases, e.g. *Hopkins v. De Robeck* (1789), 3 T.R. 79.

⁹ *Ball v. Fitzgerald* (1730), 1 Barn. K.B. 401; *Triquet v. Bath* (1764), 3 Burr. 1478; *Heathfield v. Chilton* (1767), 4 Burr. 2015; *Fisher v. Begrez* (1832), 1 Cr. and M. 117.

themselves of offices of service to an ambassador simply to claim the Section 3 immunity.¹

Before 1964 members of the technical and administrative staff, the service staff and private servants, too, received full civil immunity under Section 3 of the 1708 Act; they probably received full criminal immunity as well.² Now, administrative and technical staff receive full criminal immunity and civil immunity only *for their official acts*. Service staff receive both types of immunity in respect of their official acts and private servants receive no more immunity than the receiving State sees fit to grant them, with the proviso that the receiving State must exercise its jurisdiction over private servants in such a manner as not to interfere unduly with the performance of the functions of the mission.

With regard to civil immunity, therefore, it is apparent that Article 37 has limited the immunity formerly enjoyed by those inferior to the diplomatic agent. That this is so was recently shown in the case of *Empson v. Smith*.³ In that case, the plaintiff had made a tenancy agreement to let her house to the defendant, an administrative officer at the Canadian High Commission, in 1961. Because of his status and the likelihood of his recall or transfer at any time, a clause was incorporated into the agreement which provided that in the event of the tenant's being officially ordered by his Government to duty outside London and the landlord's being duly notified in writing, the agreement should cease and terminate three calendar months after the date of delivery of the notice. Some two months after the tenancy agreement was completed, the defendant was officially ordered to proceed on a tour of duty in Europe and he gave the plaintiff the requisite notice to determine the tenancy. In 1963 the plaintiff, for reasons not apparent from the report, began proceedings in the county court claiming damages for breach of the tenancy agreement. In December 1964, after several adjournments, the judge ordered that the plaintiff's action be struck out as it was a nullity. The plaintiff appealed to the Court of Appeal. The court was of opinion that the plaintiff was entitled to succeed to the extent of having the matter heard by the county court so that it could be established whether the Diplomatic Privileges Act 1964 had removed the defendant's immunity from liability in respect of the tenancy agreement, and, if so, whether the plaintiff's claim had any merits. Sellers L.J. thought that a change in the law would allow the action to proceed if it removed the immunity previously granted. Danckwerts L.J., concurred, adding that in view of Article 37 of

¹ *Crosse v. Talbot* (1724), 8 Mod. Rep. 288; *Crutchfield v. Lockman* (1734), Cunn. 97; *Poitier v. Croza* (1749), 1 Wm. Bl. 48; *Lockwood v. Coysgarne* (1765), 3 Burr. 1676; *Fontainier v. Heyl* (1765), 3 Burr. 1731; *Delvalle v. Plomer* (1811), 3 Camp. 47.

² Although in view of *R. v. Madan*, [1961] 2 Q. B. 1, such an argument is not a strong one; see a full discussion of this matter below, pp. 353 et seq.

³ [1965] 3 W.L.R. 380.

the Schedule to the 1964 Act, members of the administrative and technical staff of a mission were entitled to immunity from civil liability only in so far as they were acting in the course of their duties in incurring such liability. The Foreign Secretary's certificate stated that the defendant was a member of the administrative and technical staff of the Canadian Diplomatic Mission; what lay to be determined was whether, in December 1964, his immunity had been lessened by the Diplomatic Privileges Act which came into force on 1 October 1964. Diplock L.J. was of opinion that by December 1964 the defendant's right to immunity from civil suit had been curtailed by the Act of 1964. As a member of the administrative and technical staff of the mission his immunity from the civil jurisdiction of the English courts did not extend to acts performed outside the course of his duties. Consequently, the appeal was allowed.

As to unofficial activities, Section 5 of the 1708 Act did lay down that the privileges of the Act did not extend to any servant who engaged as a merchant or trader. The limitation imposed by this section was specifically upheld in *Crutchfield v. Lockman*,¹ and referred to with approval in many other cases.² Under Article 37, the exception is more precise, and perhaps more limited. If a member of the technical and administrative staff engages in trade outside *his official functions*, he is deprived of whatever civil immunity he might otherwise have had, by the application of Article 31 (1)(c).

12. *Waiver of Immunity*

Section 2 (3) of the Act states:

'For the purposes of Article 32 a waiver by the head of the mission of any State or any person for the time being performing his functions shall be deemed to be a waiver by that State.'

Article 32 then provides:

'1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.

'2. The waiver must always be express.

'3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

'4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.'

Section 2 (3) is really a proviso attached to Article 32, paragraph (1), which requires any waiver to be exercised by the sending State—a paragraph

¹ (1734), Cunn. 97.

² *Wigmore v. Alvarez* (1731), FitzGibbon 200; *Barbuit's case* (1737), Talbot 281; *Taylor v. Best* (1854), 14 C.B. 487.

which retains a rule of practice that is well established in England. The basis of the rule is that the privileges and immunities granted to the diplomatic agent are those of *the sending State* and that consequently they cannot be waived by the agent himself. Many authorities have voiced this opinion. Lord Ellenborough in *Marshall v. Critico*¹ said: 'This is not a privilege of the person but of the State which he represents.' Again, Lord Hewart L.C.J., in *Dickinson v. Del Solar*,² said that 'the privilege is the privilege of the sovereign by whom the diplomatic agent is accredited' and Lord Caldecote L.C.J., in *R. v. AB*,³ observed that 'the privilege . . . is a privilege which is derived from, and in law is the privilege of . . . the State which sends the ambassador'.

The rule of practice in England has always been that the Government of the sending State must waive the immunity of the head of the mission, but the latter can himself waive the immunity of those below him. The combination of Article 32 (1) and Section 2 (3) makes no change in this rule, except, perhaps, to enable the head of the mission to waive his own immunity. But that will be a matter for the Government of the sending State; in England the Foreign Office will be content with official notification that the immunity has been waived. The question of who is entitled to waive immunity has arisen twice in recent years, in connection with servants who claimed the right to waive their own immunity. In *R. v. AB*,⁴ the appellant, who was a code clerk at an embassy in London, had been convicted of offences under the Official Secrets Act and of larceny. He was immediately dismissed from his post and arrested. The ambassador waived any right of diplomatic privilege that the defendant might have. AB appealed against his conviction on the grounds that he was entitled to diplomatic privilege which *he* had not waived and that such privilege extended to a reasonable time after the cesser of his employment with the embassy. He contended that waiver by his Government and by the ambassador was ineffective to deprive him of the privilege. Lord Caldecote disagreed and pointed out that it was a well-established rule that in law the privilege was not his to waive. On the appellant's second ground, the Lord Chief Justice said that the privilege can only continue after cesser of office if no waiver has been made, as the rule exists to enable the official to wind up his affairs. A similar conclusion was reached in *R. v. Madan*,⁵ where a clerk in the employ of the Indian High Commission was charged with obtaining a season ticket and money by false pretences. He was in fact entitled to diplomatic immunity under Section 1 (4) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952.⁶ At the committal for

¹ (1808), 9 East. 447.

² [1930] 1 K.B. 376, at 380.

³ Otherwise known as *R. v. Kent* [1941], 1 K.B. 454, at 457.

⁴ [1941] 1 K.B. 454 (CCA).

⁵ [1961] 2 Q.B. 1 (CCA).

⁶ 15 and 16 Geo. VI and 1 Eliz. II, c. 18.

trial his solicitor purported to waive the immunity when it was mentioned by a police officer, and the matter was not mentioned again until after his conviction. At this stage he raised the plea of immunity. The High Commission, on hearing of the matter, wrote to the Commonwealth Relations Office and waived the immunity. However, the waiver was not expressed to be retrospective and the question arose: had the appellant waived his immunity by appearing at the lower court so as to let the conviction stand, despite the subsequent waiver by the High Commission? Lord Parker L.C.J. held that the appellant was unable in law to waive his immunity; 'it is not the person entitled to a privilege who may waive it . . . it must be the waiver of the representative of the State'.¹ His conviction was quashed on that ground. The court forbore to comment on what the position would have been if the waiver by the High Commission had purported to be retrospective. Thus Article 32 (1) and Section 2 (3) of the Act have carried on the rule that a servant cannot waive his own immunity and in that respect one can expect any case on similar facts in the future to be decided on the same basis.

However, one point in *R. v. Madan* could not arise again. Article 32 (2) lays down that waiver must always be express, so there can no longer be any question of a court's *presuming* immunity to have been waived. Unless it has been waived expressly, it will be presumed not to have been waived. This provision will undoubtedly make the issue of whether or not a privilege has been waived more simple. It changes the law as previously understood in England. The law was indeed far from clear on this issue, but the principle found in the cases certainly seemed to be that implied waiver was sufficient. In *Taylor v. Best*,² the First Secretary of the Belgian Legation in London, who was a director of a mining company, instructed his solicitor to accept service of a writ issued by the shareholders against the directors to recover their deposits on shares. Having further instructed his solicitor to enter an appearance to the writ, he claimed that he was protected by diplomatic privilege. It was held, *inter alia*, that having submitted to the jurisdiction, he could not succeed in his application to have the action stayed on that ground. The basis of this decision must have been that he had impliedly waived his immunity, which he was entitled to do himself as he was acting as Chargé d'Affaires in the Minister's absence. However, implied waiver was not easy to prove, as was shown in *Re Republic of Bolivia Exploration Syndicate Ltd.*³ In that case, the liquidator of a company issued a summons against the directors and auditors for misfeasance. The Second Secretary at the Peruvian Legation was a director of the company. He entered an appearance and some months later he asked for extended time in which to file evidence. Later he filed an affidavit stating his diplomatic

¹ [1961] 2 Q.B. 1, at 7.

² (1854), 14 C.B. 487.

³ [1914] 1 Ch. 139.

position but made no claim to immunity. At the hearing of the summons, he claimed that he was entitled to diplomatic privilege. The liquidator pleaded that he had impliedly waived his immunity by taking steps in the action. But Astbury J. saved him on two grounds:¹

- (i) Waiver implies a knowledge of the rights waived and he was not satisfied that the defendant knew of his rights because knowledge of Statute law and Common law cannot be imputed to a foreigner;
- (ii) A subordinate secretary cannot waive this privilege without his Government's sanction and there was no evidence of such sanction in this case.

The *ratio decidendi* of this case would appear to be that there was, in fact, no waiver in the circumstances. The first ground of the decision gets very close to a forced escape from *Taylor v. Best*,² which laid down a very firm rule regarding the circumstances in which waiver could be implied. Considerable discussion of the subject took place in *In re Suarez, Suarez v. Suarez*.³ In that case, the Bolivian Minister was sued for an account as administrator of an intestate's estate. He waived his privilege and instructed his solicitors to accept service of a summons. Later, he appeared at the hearing of the summons. Some three years later, an action for sequestration was brought against him and he claimed diplomatic immunity. Swinfen Eady and Warrington L.J.J., following *Taylor v. Best*,⁴ held that he was not entitled to claim privilege at this stage. Warrington L.J. observed 'that in law an action which the privilege would have rendered impossible of prosecution may be continued effectively if the privilege is not insisted on was decided in . . . *Taylor v. Best*'.⁵ Scrutton L.J. doubted the authority of *Taylor v. Best*, in view of its treatment in subsequent cases⁶ and in view of the provision in the Diplomatic Privileges Act of 1708 that all writs and processes issued against ambassadors are null and void.⁷ If that is so, he reasoned, how can the question of waiver arise at all? However, he found against the appellant on the ground that he was estopped by his conduct from alleging that the proceedings were invalid. This appears to amount to

¹ Astbury, J. refused to treat *Taylor v. Best* as authority except on the very special facts of that case, i.e. that the First Secretary was joined as a formal defendant.

² (1854), 14 C.B. 487.

³ [1918] 1 Ch. 176.

⁴ (1854), 14 C.B. 487.

⁵ At 196.

⁶ The reasoning in that case was severely criticized in *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. and E. 94 and *Musurus Bey v. Gadban*, [1894] 2 Q.B. 352; in both these cases it was successfully argued that the meaning of Section 3 of the 1708 Act which laid down that 'all writs and processes . . . shall be deemed and adjudged to be utterly null and void' meant that such writs were void *ab initio*; in the latter case Davey L.J. observed that the words of the Statute forbade the court to entertain an action at all. He added that the court had no jurisdiction even to issue the writ (at 361-2). In *Empson v. Smith*, [1965] 3 W.L.R. 380, Diplock L.J. denied the efficacy of this argument. He said that *In re Suarez*, [1918] 1 Ch. 176 laid down that notwithstanding the 1708 Act, a writ issued in the High Court against an ambassador was not void *ab initio*. If it were, he said, it would be impossible for the privilege ever to be waived for there could be no effective waiver until the court was actually seized of the proceedings. Until steps were taken to set aside the plaint, he concluded, it was not a nullity, but valid.

⁷ Section 3.

his accepting the *fact* of the waiver without accepting the law on the matter. It is suggested that Scrutton L.J.'s view that the question of waiver cannot arise in view of the 1708 Act is in principle correct,¹ but has not been followed by the courts since *Taylor v. Best* for practical reasons.

If the foundations of implied waiver had become a little shaky, the case of *Dickinson v. Del Solar*² gave them new strength. The defendant, the First Secretary at the Peruvian Legation, was successfully sued for negligent driving, whereupon he brought in his insurance company as third party. The latter claimed that the defendant was entitled to diplomatic privilege, thereby shielding them from liability. It was shown that the defendant had entered an appearance in the action and Lord Hewart C.J. stated that the privilege had been waived and jurisdiction submitted to by the appearance. Following *Taylor v. Best*³ and *In re Suarez*,⁴ the Lord Chief Justice observed that, 'as Mr. Del Solar had so submitted to the jurisdiction it was no longer open to him to set up privilege',⁵ and found that the privilege had been waived by implication.

The most recent case on this topic contained an assortment of unusual facts. In *Ghosh v. D'Rozario*⁶ the plaintiff, an Indian doctor, issued a writ for slander against the defendant. The latter had been on the diplomatic list as education counsellor to the Indian High Commission between 1951 and 1957 but at the time of service of the writ he was no longer on the list. He entered an appearance in the action and a second writ was served on him for slander uttered in respect of the first. The two actions were consolidated. In 1960 the defendant was once again placed on the diplomatic list when he became scientific adviser to the High Commissioner. He claimed a stay of proceedings on the ground that he was entitled to diplomatic immunity. The novel point to be decided was whether the immunity extended to protect the defendant from an action commenced before he was entitled to immunity. The Court of Appeal held that it made no difference whether the facts which were the basis of the protection afforded by diplomatic immunity occurred before the writ was issued or while the action was in existence, and that the general principles which conferred diplomatic immunity against the initiation of legal proceedings conferred an equal immunity against the continuation of pre-existing and hitherto properly constituted proceedings. The action against the defendant was stayed. The decision in this case would seem to be clearly in accord with the law laid down in the Diplomatic Privileges Act 1964.⁷

Article 32 (3) lays down a principle which is in accordance with the

¹ Cf. Diplock L.J. in *Empson v. Smith*, [1965] 3 W.L.R. 380.

² [1930] 1 K.B. 376.

³ (1854), 14 C.B. 487.

⁴ [1918] 1 Ch. 176.

⁵ At 380; as a result of this case, diplomatic circulars were issued to the effect that all persons entitled to immunity must be insured against third-party risks.

⁶ [1963] 1 Q.B. 106 (CA).

⁷ 1964, c. 81.

decisions, but which had not received the imprint of any judicial pronouncement. If the old cases on implied waiver are still good law, they ensure that the rule in Article 32 (3) was observed, as a counter-claim could not be made if the diplomat had not submitted to the jurisdiction sufficiently to initiate proceedings. In this respect, the pre-1964 implied waiver cases appear still to be valid because Article 32 (3) in effect states that when a diplomatic agent impliedly waives his immunity so as to institute proceedings, he cannot claim it in respect of a counter-claim directly connected with the principal claim.

Article 32 (4) lays down a well-established rule of practice in this country. In *Taylor v. Best*,¹ Jervis C.J. observed:

‘The authorities . . . do not show that the ambassador may not submit himself to the jurisdiction, for the purpose of having the matter in difference investigated and ascertained; but only that the sacred character of the person of the ambassador cannot be affected by any act or consent on his part; and that, by interfering with the person of the ambassador, or with the goods which are essential to the personal comfort and dignity of his position, you are in effect attacking the privilege of his master.’²

Astbury J., following the text-writer, seems to have considered a waiver for the purpose of execution impossible in *Re Republic of Bolivia Exploration Syndicate Ltd.*³ He said in that case:

‘No judgement or execution can be enforced or levied against the defendant, and the authorities show the impropriety of allowing the action to go on merely for the purpose of defining his liability.’⁴

It is submitted that this view was too wide, and that the correct position in English law prior to the 1964 Act was that if judgment was given against a diplomatic agent, it could not be enforced until a reasonable time after his recall.⁵ This meant that until he was recalled, the judgment against him could not be enforced, which corresponded to the provision now found in Article 32 (4).

The parties to the Vienna Convention were not unaware of the importance of waiver and of the role which it may play in lessening the friction that may be caused by over-insistence on diplomatic immunity. At the twelfth plenary meeting on 14 April 1961, the following resolution was adopted:

‘The United Nations Conference on Diplomatic Intercourse and Immunities.

‘Taking note that the Vienna Convention on Diplomatic Relations adopted by the Conference provides for immunity from the jurisdiction of the receiving State of members of the diplomatic mission of the sending State; Recalling that such immunity may be waived by the sending State;

¹ (1854), 14 C.B. 487.

² At 523; *In re Suarez*, *Suarez v. Suarez*, [1918] 1 Ch. 176.

³ [1914] 1 Ch. 139.

⁴ At 157.

⁵ *In re Suarez*, *Suarez v. Suarez*, [1918] 1 Ch. 176.

Recalling further the statement made in the Preamble to the Convention that the purpose of such immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions; Mindful of the deep concern expressed during the deliberations of the Conference that claims of diplomatic immunity might, in certain cases, deprive persons in the receiving State of remedies to which they are entitled by law;

Recommends that the sending State should waive the immunity of members of its diplomatic mission in respect of civil claims of persons in the receiving State when this can be done without impeding the performance of the functions of the mission, and that, when immunity is not waived, the sending State should use its best endeavours to bring about a just settlement of the claims.¹

This resolution is not in any way binding on the States who were parties to the Convention, nor is it part of the 1964 Act, but it may serve as a reminder of the true purposes of immunity.

Article 38 of the Convention provides:

'1. Except in so far as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.

'2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.'

Before 1964 United Kingdom citizens on the staff of foreign diplomatic missions in the United Kingdom enjoyed immunity from suit in respect of their official acts as a result of the Diplomatic Immunities Restriction Act 1955.² This Act was repealed by the 1964 Diplomatic Privileges Act, largely because of the provision of Article 38. Under this Article the previous position is only maintained as far as heads of mission and diplomatic agents are concerned. For all other ranks there is no immunity at all unless it is granted as part of a special arrangement by Order in Council under Section 2 (6). In addition the same limitations will for the first time apply to *permanent residents* as well. Previously, nationality was the sole ground for discrimination. This new provision is indeed the very reverse of the principle established in *Macartney v. Garbutt*,³ that where a British subject is

¹ It is perhaps interesting to note the observations of the *Interdepartmental Committee on State Immunities*, Cmnd. 8640, paragraph 3, in which it is suggested that where the Head of the Mission refuses to waive the immunity of an accused or defendant diplomatic agent or, in civil disputes, where the latter refuses to submit the case to private arbitration, the Foreign Office could and would declare him unacceptable as a diplomatic agent.

² 4 and 5 Eliz. II, c. 21.

³ [1890] 24 Q.B.D. 368; see also *Re Cloete* (1891), 65 L.T. 102. But despite the result of *Macartney v. Garbutt*, it was stated in the case that where a British subject is received by the Crown as the diplomatic representative of a foreign State, the British Government can insist that he will not be exempt from local jurisdiction. So the practice grew up of the Foreign Office refusing to grant full immunity. See *Interdepartmental Committee on State Immunities*, Cmnd. 8640, paragraph 8.

accredited to this country as a member of a foreign embassy, he is not subject to our jurisdiction unless the British Government expressly lays this down at the time of his reception. In that case, the English Secretary to the Chinese Embassy was held not liable to have his household furniture seized for non-payment of rates.

Paragraph 2 limits the former immunity of a British national who is a member of the administrative, technical or service staff of a mission. Under Section 3 of the 1708 Act,¹ if he proved that he was a *bona fide* domestic servant, he could at least get full immunity from civil jurisdiction.²

13. *Commencement and Termination of Immunities and Privileges*

Article 39 of the Convention provides:

'1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such ministry as may be agreed.

'2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

'3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

'4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.'

This Article deals with the commencement and termination of immunities and privileges. The provision in paragraph 1 has, as a matter of practice, always been observed in this country. Satow stated that before starting his journey the diplomat should notify the receiving State of the probable date of his arrival, so that he could have the benefit of all immunities attaching to him from the moment he reaches the frontier.³ The main effect will of course be his immunity from Customs examination upon entry into the country as set out in Article 36.

¹ 7 Anne, c. 12.

² *Seacomb v. Bowlney* (1743), 1 Wils. K.B. 20; *Masters v. Manby* (1757), 1 Burr. 401; *Darling v. Atkins* (1770), 3 Wils. 33; *Novello v. Toogood* (1823), 1 B. and C. 554.

³ Satow, *op. cit.*, p. 143.

Paragraph 2 deals with the cesser of immunity. The main ways in which a diplomat's mission may be terminated during his lifetime are as follows:

- (i) By his recall on his appointment elsewhere.
- (ii) By his resignation and its acceptance by his Government.
- (iii) By his recall at the request of his Government (usually because of dissatisfaction).
- (iv) By his recall at the request of the Government to whom he is accredited.
- (v) By the decease of his own sovereign¹ or the sovereign to whom he is accredited.
- (vi) If he has assumed the responsibility of breaking off diplomatic relations.
- (vii) By a change in his rank.²

The principle expressed in this paragraph, that the immunities shall subsist until the expiry of a reasonable period in which the diplomat can leave the country, is in accordance with English case law. The matter first arose in *Magdalena Steam Navigation Co. v. Martin*,³ in which the Guatemalan ambassador was held entitled to immunity despite the fact that the action arose out of his trading activities.⁴ Campbell C.J. said:

'There can be no execution while the ambassador is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall.'⁵

This principle was upheld in *Musurus Bey v. Gadban*.⁶ In that case the plaintiff, as executor of a Turkish ambassador who had left the country some nine years previously, claimed moneys collected by the defendants. They counterclaimed in respect of a debt allegedly owing them by the late ambassador. The crux of the matter was whether or not the defendants' claim was statute-barred and A.L. Smith L.J., referring to the *Magdalena Steam* case,⁷ said:

'It was there held that there could be no execution against an ambassador while he is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall.'⁸

The decision of the Court of Appeal followed the earlier authority. The reason given for the extension of the immunity was that the diplomatic agent must be given time to wind up his official affairs before leaving the country. In *In re Suarez*,⁹ a case in which immunity was waived by implication and then claimed at a later stage in the proceedings, Swinfen Eady L.J. refused to allow it to be reclaimed, saying: 'It is not a case in which a claim is made for a reasonable time to wind up the affairs of his legation.'¹⁰ This would appear to be another instance of the recognition of this principle, if

¹ The death of a president of a republic does not have this effect although in such a case fresh credentials are necessary.

² See Satow, *op. cit.* pp. 274-6.

⁴ See above, p. 352.

⁷ (1859), 2 E. and E. 94.

⁸ [1894] 2 Q.B., p. 352, at 358.

⁵ (1859), 2 E. and E. 114.

³ (1859), 2 E. and E. 94.

⁶ [1894] 2 Q.B. 352.

⁹ [1918] 1 Ch. 176.

¹⁰ At 192.

not of its application. In *The Tervaete*,¹ Bankes L.J. observed *obiter* that 'the ambassador's immunity lasts for such a reasonable period after he has presented his letters of recall to enable him to wind up his official business and to prepare for his return home'.

Paragraph 3 of this Article, extending the principle to the members of the family of a member of the mission who dies in the receiving State corresponds to the English practice prior to the passing of the 1964 Act.² Paragraph 4, relating to the disposal of effects of a deceased member of the mission or a member of his household, in effect means that his movable property may be removed from the receiving State unless its export is prohibited and that death duties may not be levied on such property if it is in the receiving State solely as a consequence of the deceased's residence there. His immovable property will be dealt with according to the *lex loci rei sitae*. These, too, are matters of practice which do not differ in substance from the pre-1964 law or practice.

14. *Immunities and Privileges of Diplomatic Agents not accredited to the United Kingdom*

Article 40 of the Convention provides:

'1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

'2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.

'3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa, if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.

'4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure*.'

These provisions, although arguably new law even on the international plane, will present no difficulty in this country. As Satow pointed out, it is so much in the interest of all nations that their diplomatic representatives should be allowed to pass freely and without hindrance through such countries as they may have to traverse in order to reach, or to return from,

¹ [1922] 259 at 265.

² Satow, *op. cit.*, p. 278.

their posts, that it is usual to afford all reasonable facilities and courtesies for the purpose.¹ There were no recorded decisions on this topic in the United Kingdom before 1964.

CONCLUSION

Before a final appreciation is made of the provisions of the Diplomatic Privileges Act, 1964, it must be recalled that articles of the Vienna Convention which are not embodied in the Diplomatic Privileges Act 1964² are not part of English law, so as to be binding provisions.³ In fact almost all these Articles deal with administrative details or matters of practice and for the most part it would appear that they are not necessary or even relevant to the strictly legal aspects of the subject.⁴ As Mr. Matthew said in the House of Commons when introducing the Bill: 'The Articles omitted from Schedule I are those which would not require legislation in order to be enforced.'⁵ In particular, they relate, with few exceptions, to the rights and duties of the receiving and sending States, as opposed to their diplomatic agents personally. Even where a duty is laid upon a diplomatic agent, it is one which is in the nature of an administrative direction rather than a rule capable of legal enforcement. An example is Article 41, which states that 'it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.' If the language of that Article is compared with the language of the Articles embodied in the Act, it will be seen that there is a marked difference.

In general, as has been seen, the new Act reproduces rules which were already law in the United Kingdom. Lord Carrington, in moving the second reading of the Bill in the House of Lords, summed it up as follows:⁶

'This Bill will provide a single statement of the relevant rules, and will do this on the basis of the Vienna Convention. Thus, the rules to be applied in the United Kingdom will be the rules of the Convention itself. For the greater part, these rules will be the same as those now applied in our law or in practice. But there will be some changes. The tendency of the Convention and of the Bill is to reduce the extent of immunities from our jurisdiction while making comparatively minor changes in privileges which in the sum add or subtract very little.'

This seems a fair appreciation of the effect of the Act. Of the three main changes made by it two operate as material reductions in immunities previously recognized in our law.

The first of these changes, rightly stressed by Lord Carrington later in his speech, is the distinction now drawn between the different categories of

¹ Satow, *op. cit.*, p. 243.

² 1964, c. 81.

³ See above, pp. 326-7.

⁴ See Cmnd. 1368 for the complete articles of the Vienna Convention.

⁵ *Hansard*, H.C., 1964, vol. 697, col. 1407.

⁶ *Hansard*, H.L., 1964, vol. 258, cols. 36-40.

members of the staff of a diplomatic mission. Under the old law, as we have seen, all members of the diplomatic staff in principle enjoy full immunity, but today this is so only in the case of the head of mission and of diplomatic agents *stricto sensu*. Administrative and technical staff are now fully liable in civil proceedings for their private acts, i.e. for acts performed outside the course of their official duties; and this category alone was said by Lord Carrington to comprise over 3,000 individuals. Service staff, constituting another large group of individuals, are now fully liable under the Act for their private acts in both civil and criminal proceedings.

The second main change made by the Act affects the diplomatic agent himself, depriving him of the immunity in respect of private trading or professional activities which our Courts had accorded him in such cases as *Taylor v. Best*, *The Porto Alexandre* and *Re Republic of Bolivia Exploration Syndicate Ltd.*¹ This change in the existing law, although not emphasized by the Government in moving the Bill, is of some importance. At the same time, it is to be noted that the Act (Article 31, paragraph 1 (c) of the Schedule) negatives the immunity only in respect of 'professional or commercial activity exercised by the diplomatic agent in the receiving State *outside his official functions*'. Accordingly, the Act does not change the position in any way in regard to the thorny question of the immunities of the State itself in respect of *State trading activities*.

The other main change brought by the Act—that waiver of immunity must always be express—tends in the opposite direction: to reinforce rather than to diminish immunity from civil jurisdiction. If it does not enlarge the scope of diplomatic immunities, it does prevent an immunity in civil proceedings from being lost by the mere fact of taking some step to defend the action. This change may not, however, be very substantial, because of the clear recognition by the Courts in recent years that such an implied waiver of his immunity by an individual would not be binding on his Government unless the latter (or the head of mission) had authorized him to waive his immunity.² The chief result of the change should, indeed, be to give those starting litigation against diplomatic personnel a greater protection against being confronted with a plea of immunity at a late stage of the proceedings after heavy costs have been incurred; for the Court must now require express evidence of waiver as soon as it has notice of the defendant's immune status.

Parliament is justifiably jealous of the rights of the ordinary citizen and has frequently voiced its anxieties at the large increase in the number of privileged persons invested with jurisdictional immunity as a result of the growth of international organizations and the burgeoning of the new

¹ For these cases see above, pp. 353 et seq.

² See the case of *Price v. Griffin* reported in this *Year Book*, 26 (1949), p. 433.

States. Some members in both Houses would, no doubt, have wished to see the reductions in immunity effected by the Vienna Convention and the 1964 Act go much further; and this wish was certainly intensified by the abuse of the traffic laws in the London area by the diplomats of some countries. The Government, however, was bound to give no less weight to the contrary requirement of the protection of our own diplomatic personnel serving in foreign countries, where not infrequently they may face conditions of internal strife, or a local Government whose attitude towards foreign diplomats leaves much to be desired. It was this kind of consideration which, no doubt, led Lord Carrington to say in the House of Lords:

‘When considering these questions of diplomatic privilege, we should always remember not only the desire to limit the privileges of the representatives of other States in the United Kingdom, but also the need to ensure the free and proper representation of the interests of the U.K. by our diplomatic missions in other countries. We believe that the Convention taken as a whole achieves this end. Therefore, my Lords, while calling attention to some of the changes in our law which will result from giving effect to the Vienna Convention, *I do not wish to lay too much emphasis on the reduction in immunities which will in fact result.*’

Finally, in appreciating the impact of diplomatic immunities upon the right of redress of the ordinary citizen it is in any event necessary to bear in mind that the effect of the immunity is not to absolve the diplomat from all responsibility but merely to remove the matter from the municipal courts to the diplomatic channel. The wronged individual is by no means left without hope of redress, as was emphasized in the report of an Interdepartmental Committee on Diplomatic Immunity presented to Parliament in 1952:¹

‘The practice of the Foreign Office is based on the principle that diplomatic immunity is accorded not for the benefit of the individual in question, but for the benefit of the State in whose service he is, in order that he may fulfil his diplomatic duties with the necessary independence. A person who possesses diplomatic immunity only possesses immunity from legal process and is still subject to the operation of the law of the land, criminal or civil. Diplomatic immunity should not permit any individual who is involved in a civil dispute with another member of the community to be in an advantageous position in that dispute so that he can avoid either discharging obligations which he has contracted or making reparation for torts which he has committed. Further, the person possessing diplomatic immunity should not be able to use his immunity from suit to impose on the other party to the dispute the view of himself or his advisers as to his liability. Consequently, when a dispute arises between a person living in this country and a person possessing diplomatic immunity here and the dispute cannot be settled directly between the parties, it is commonly reported to the Foreign Office and the Foreign Office then approaches the diplomatic mission concerned with the request that the Head of the Mission will either waive the immunity of the member of his staff so that the dispute can be decided in the ordinary way in the courts or that the matter should be decided by a private arbitration conducted under conditions

¹ Miscellaneous No. 1 (1952), Cmd. 8460.

which are fair to both sides. Such requests are commonly acceded to, and the cases where this approach has not brought about a proper settlement of the matter have generally been cases where, owing to delay, the foreign diplomat in question has already left the country before the matter can be dealt with, a delay which is generally due to a failure of the party who thinks he is injured to approach the Foreign Office promptly. If a case arose where the foreign mission concerned was neither willing to waive immunity nor to persuade the foreign diplomat to accept a reasonable arbitration and the foreign diplomat remained in this country, the Foreign Office would in the circumstances feel obliged, unless there were exceptional features in the case, to inform the foreign mission concerned that this individual could no longer be accepted as a person holding a diplomatic appointment in this country.'

The practice described in this report may clearly do much to mitigate some of the effects of diplomatic immunity and offers a possible means of recourse of which lawyers advising persons suffering injury at the hands of a diplomat should take note. The legal régime governing redress for wrongs done by diplomatic personnel is by no means all to be found in the Diplomatic Privileges Act 1964; nor are all the remedies to be found in actions in our municipal courts.

APPENDIX

Diplomatic Privileges Act 1964

(Full text)

1. The following provisions of this Act shall, with respect to the matters dealt with therein, have effect in substitution for any previous enactment or rule of law.

2. (1) Subject to section 3 of this Act, the Articles set out in Schedule 1 to this Act (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961) shall have the force of law in the United Kingdom and shall for that purpose be construed in accordance with the following provisions of this section.

(2) In those Articles:

'agents of the receiving State' shall be construed as including any constable and any person exercising a power of entry to any premises under any enactment (including any enactment of the Parliament of Northern Ireland);

'national of the receiving State' shall be construed as meaning citizen of the United Kingdom and Colonies;

'Ministry for Foreign Affairs or such other ministry as may be agreed' shall be construed as meaning the department of the Secretary of State concerned;

and, in the application of those Articles to Scotland, any reference to attachment or execution shall be construed as a reference to the execution of diligence, and any reference to the execution of a judgment as a reference to the enforcement of a decree by diligence.

(3) For the purposes of Article 32 a waiver by the head of the mission of any State or any person for the time being performing his functions shall be deemed to be a waiver by that State.

(4) The exemption granted by Article 33 with respect to any services shall be deemed to except those services from any class of employment which is insurable employment,

or in respect of which contributions are required to be paid, under the National Insurance (Industrial Injuries) Acts 1946 to 1964, the National Insurance Acts 1946 to 1964, any enactment for the time being in force amending any of those Acts, or any corresponding enactment of the Parliament of Northern Ireland, but not so as to render any person liable to any contribution which he would not be required to pay if those services were not so excepted.

(5) Articles 35, 36 and 40 shall be construed as granting any privilege or immunity which they require to be granted.

(6) The references in Articles 37 and 38 to the extent to which any privileges and immunities are admitted by the receiving State and to additional privileges and immunities that may be granted by the receiving State shall be construed as referring respectively to the extent to which any privileges and immunities may be specified by Her Majesty by Order in Council and to any additional privileges and immunities that may be so specified.

3. (1) If it appears to Her Majesty that the privileges and immunities accorded to a mission of Her Majesty in the territory of any State, or to persons connected with that mission, are less than those conferred by this Act on the mission of that State or on persons connected with that mission, Her Majesty may by an Order in Council withdraw such of the privileges and immunities so conferred from the mission of that State or from such persons connected with it as appears to Her Majesty to be proper.

(2) An Order in Council under this section shall be disregarded for the purposes of paragraph (a) of the proviso to section 4 of the British Nationality Act 1948 (citizenship of children of certain persons possessing diplomatic immunity).

4. If in any proceedings any question arises whether or not any person is entitled to any privilege or immunity under this Act a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question shall be conclusive evidence of that fact.

5. (1) In section 14 (1) of the Aliens Restriction (Amendment) Act 1919 (except for diplomatic persons) for the words 'head of a foreign diplomatic mission or any member of his official staff or household' there shall be substituted the words 'member of a mission (within the meaning of the Diplomatic Privileges Act 1964) or any person who is a member of the family and forms part of the household of such a member'.

(2) In paragraph (a) of the proviso to section 4 of the British Nationality Act 1948 for the words from 'possesses such immunity' to 'His Majesty' there shall be substituted the words 'is a person on whom any immunity from jurisdiction is conferred by or under the Diplomatic Privileges Act 1964 or on whom such immunity from jurisdiction as is conferred by that Act on a diplomatic agent is conferred by or under any other Act'.

6. (1) No recommendation shall be made to Her Majesty in Council to make an Order under section 2 of this Act unless a draft thereof has been laid before Parliament and approved by resolution of each House of Parliament; and any statutory instrument containing an Order under section 3 of this Act shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(2) Any power to make an Order conferred by the foregoing provisions of this Act includes power to vary or revoke an Order by a subsequent Order.

7. (1) Where any special agreement or arrangement between the Government of any State and the Government of the United Kingdom in force at the commencement of this Act provides for extending:

(a) such immunity from jurisdiction and from arrest or detention, and such inviolability of residence, as are conferred by this Act on a diplomatic agent; or
(b) such exemption from customs duties, taxes and related charges as is conferred by this Act in respect of articles for the personal use of a diplomatic agent;
to any class of person, or to articles for the personal use of any class of person, connected with the mission of that State, that immunity and inviolability or exemption shall so extend, so long as that agreement or arrangement continues in force.

(2) The Secretary of State shall publish in the London, Edinburgh and Belfast Gazettes a notice specifying the States with which and the classes of person with respect to which such an agreement or arrangement as is mentioned in subsection (1) of this section is in force and whether its effect is as mentioned in paragraph (a) or paragraph (b) of that subsection, and shall whenever necessary amend the notice by a further such notice; and the notice shall be conclusive evidence of the agreement or arrangement and the classes of person with respect to which it is in force.

8. (1) This Act may be cited as the Diplomatic Privileges Act 1964.

(2) This Act shall be construed as if Southern Rhodesia were a State.

(3) This Act shall come into force on such day as Her Majesty may by Order in Council appoint.

(4) The enactments mentioned in Schedule 2 to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

(5) Any Order in Council under the Diplomatic Immunities Restriction Act 1955 which is in force immediately before the commencement of this Act shall, so far as it could have been made under section 3 of this Act, have effect as if so made.

A GENERATION OF CANADIAN EXPERIENCE WITH INTERNATIONAL CLAIMS*

By CHARLES V. COLE¹

INTRODUCTION

THE growth of Canada's responsibility for dealing with Canadian international claims has been described by Judge Read, formerly Judge of the International Court of Justice, in his book, *The Rule of Law on the International Plane*:²

'The trend toward Canadian participation in arbitrations affecting Canadian interests, as shown by the *Bering Sea* and *Alaskan* cases, was carried a step forward in the *North Atlantic Coast Fisheries* arbitration of 1910. The tribunal was organized under the régime of the Permanent Court of International Arbitration and the only British member was Sir Charles Fitzpatrick, a Canadian jurist. The conduct of the arbitration was controlled by the British Foreign Office, and in point of form it was an arbitration between Great Britain and the United States. But there were adequate arrangements for Canadian participation in preparing and presenting the case.

'The culmination of this development was reached in the *I'm Alone* case. . . .

'The first problem was to obtain recognition of the right of the Canadian Government to assert and exercise diplomatic protection in respect of a Canadian ship and crew. It seems obvious to those who are now equipped with hindsight. The position was not so clear thirty-two years ago, when the ship was registered and operating under British statute law, and when the Canadian Legation at Washington was less than two years old.'

On recognition of Canada's full responsibility for the negotiation of settlements of international claims during the decade before the Second World War, it was logical and convenient for this work to be primarily and largely assumed by the Department of External Affairs.³ It has long been recognized that international claims constitute an important and often delicate part of a State's foreign relations. At first the task was only occasionally onerous. In less than a generation, the previously limited and largely indirect Canadian experience,⁴ although occasionally stretched by the earlier

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¹ Legal Division, Department of External Affairs, Ottawa. The article expresses personal views of the author, and not those of the Department.

² (1961), pp. 15-21, especially at pp. 17-18. Judge Read was Legal Adviser of the Department of External Affairs for many years. Cf. F. R. Scott, 'The End of Dominion Status', *American Journal of International Law*, 38 (1944), p. 34, at pp. 36-7: 'Yet never at any time in that period [1919-1939] was the full international personality of the Dominions, as nations distinct from Great Britain, established beyond equivocation. This did not come until the second World War'

³ The Department of External Affairs was established in 1909, but its own separate Minister was not appointed until 1946.

⁴ As late as 1926, an international tribunal was saying: 'It does not follow, however, that Great Britain may not maintain a claim on behalf of the Cayuga Indians in Canada. These

demands of isolated and yet vexatious issues like those settled by the noted *I'm Alone*¹ and *Trail Smelter*² arbitrations, has grown into near maturity. In more tranquil times such a relatively brief period would not ordinarily have produced an abundance of claims. However, the world-wide conflict and the severe political, economic and social problems which followed hastened the development of Canadian experience with international claims. Canada's efforts have, for the most part, gone quietly forward and they have, in the nature of things, received until recently little publicity. The present paper has therefore been prepared in the belief that a descriptive account of some of the claims processed by the Canadian Government during this period may provide useful information regarding the scope and importance of international claims settlements in Canadian practice.

Like many Western countries after the Second World War, the Canadian Government found it necessary to give much time to the settlement of international claims owing to the vast increase in the number and in many cases in the magnitude of the claims brought to its attention; and this at a time when the Department of External Affairs was undergoing a period of rapid expansion in opening missions abroad and in enlarging headquarters in Ottawa.³ The task was not made easy by any reservoir of Canadian skills in the field. This may be attributable partly to the absence of the well-developed traditions possessed by countries such as the United States and Britain. Moreover, difficulties and complexities associated with claims have been enhanced not only by the stresses of the political attitudes and economic programmes of the major power blocs, but also by enormous international ferment.⁴ In an age of 'cataclysmic change'⁵ there has been a

Indians are British nationals. They have been settled in Canada, under the protection of Great Britain, and subsequently, of the Dominion of Canada, since the end of the eighteenth or early years of the nineteenth century'. 'The Cayuga Indians, American and British Claims Arbitration under the Agreement of 18 August 1910', Nielsen's *Report* (1926), p. 310. Cf. Erich B. Wang, 'Nationality of Claims and Diplomatic Intervention—Canadian Practice,' *Canadian Bar Review* 43 (1965), p. 136, at p. 144: 'Canadian practice in this field is of recent origin. It has evolved largely since the end of World War II, as part of the gradual process of assumption by the Canadian Government of full responsibility for the conduct of Canadian foreign relations and for the protection of Canadian persons and property abroad.'

¹ This case is summarized in Castel, *International Law, Chiefly as Interpreted and Applied in Canada* (1965), pp. 600–8. See also Mackenzie, 'Comment', *Canadian Bar Review*, 7 (1929), p. 407; Dennis, 'The Sinking of the *I'm Alone*', *American Journal of International Law*, 23 (1929), p. 351; C. C. Hyde, 'The Adjustment of the *I'm Alone* Case', *ibid.* 29 (1935), p. 296; Fitzmaurice, 'The Case of the *I'm Alone*', *this Year Book*, 17 (1936), p. 82.

² See J. E. Read, 'The *Trail Smelter* Dispute', *Canadian Year Book of International Law*, 1 (1963), p. 213.

³ For a table comparing the large increase in the number of missions, personnel and expenses between 1940 and 1960 see Castel, *op. cit.*, above, in note 1 on this page, at p. 1346.

⁴ Cf. Cohen, 'Basic Principles of International Law—A Revaluation', *Canadian Bar Review*, 42 (1964), p. 449, at pp. 455–6: '... there are today at least three areas where law and policy in the international community are now in the process of major reformulation: the "nationalization" or "confiscation" of alien property ... It is not surprising that the older doctrines concerning

[Notes 4 and 5 continued overleaf]

pressing and continuing need for the requisite combination of experienced diplomatic, political, legal and technical skills to bring to bear on these problems. In the immediate post-war years the few members of the Claims Section in the Legal Division of External Affairs were very busy trying to cope with a virtual landslide of claims. Much of the work involved close examination of international agreements, including the peace treaties, international law, State practice and foreign legislation in order to advise claimants with regard to procedures and requirements involved in obtaining compensation. Until 1955 the existence of a separate Directorate for War Claims in the Department of the Secretary of State afforded welcome assistance with analyses of claims for war damage, many of which were processed by the War Claims Commission following its creation in 1952. About eight years ago, as settlements of treaty and certain other claims reached a final stage or were concluded, the volume of active work began gradually to decrease. Four years later, on the other hand, the growing expansion of nationalization claims resulted in a five- or six-fold expansion of the Claims Section. In spite of the complexities the Canadian Government's record in pursuing a vigorous and imaginative policy with respect to the mass of claims brought to its attention and, in achieving a good measure of success with settlements, has on the whole been respectable.

CLASSIFICATION OF CLAIMS

Most claims processed by the Canadian Government after the Second World War may be grouped under certain broad classifications, i.e. pre-war debts,¹ war damage and claims resulting from post-war nationalization

justifiable nationalization and theories of compensation should be undergoing the stresses of re-formulation . . . The basic principles of international law in this field retain much of the classical form but they are becoming reshaped in substance to meet the reality of developing states resentful of their colonial-commercial past but yet in great need of assistance and receiving it, ironically, quite often from the same sources familiar to them from the imperial period.'

⁵ C. W. Jenks, 'The Prospects of International Adjudication' quoted in a Book Review, *Canadian Bar Review* 43 (1965), p. 161, at p. 165.

¹ For a brief explanation of certain types of pre-war debt claims, see *War Claims, Report of the Advisory Commission* (February, 1952), p. 20. A landmark in the settlement of German pre-war debts was the 1953 Agreement on German External Debts signed by the Federal Republic of Germany and twenty other countries, including Canada, *Canada Treaty Series* (1953), No. 2. As has been said, 'As a result of this Agreement most German external bonds were reserviced, and arrangements made for dealing with Standstill Agreement claims, blocked Deutschmark accounts, payments into the conversion office, currency options, Reichsmark and goldmark debts and gold clauses in foreign currency loans as well as old commercial claims and innumerable similar claims. An Arbitral Tribunal and Mixed Commission, to which the signatory Governments can refer matters in dispute was also established', 'International Claims', *External Affairs*, 9 (1957), p. 326, at p. 327. The Peace Treaties also contained provisions about recognition of pre-war debt obligations. See Treaty of Peace with Italy, Article 81, *Canada Treaty Series* (1947), No. 4; and Treaty of Peace with Japan, Article 18, *ibid.* (1952), No. 4. See also extract from Notes for Guidance of Claimants against Hungary printed in Castel, *op. cit.* above, p. 369, n. 1, at p. 999. Under the category of debts it is stated that this category may include: (1) defaulted principal and interest payments on Hungarian bonds held by Canadian citizens; (2) debts

programmes largely in Eastern European countries.¹ Almost all the claims falling under these categories are those in which it is considered that responsibility has been engendered by a foreign government as a result of some action, inaction or dereliction of duty towards Canadian citizens, as distinguished from a State's (Canada's) own claims.² Not included in these categories are many specific types of claims, such as those (in peace-time) arising from personal injury, wrongful death or property damage for which it is thought a State may be internationally responsible.³ A fairly recent example of wrongful death and loss of personal property (baggage) claims is the claim lodged by Canada against Bulgaria resulting from the death of four Canadians who perished in an Israeli airliner shot down in 1955 by Bulgarian air defence forces. On the other hand, the traffic in claims has not been all one way. The claims against Canada of United States citizens for water damage to their properties along the southern shore of Lake Ontario, allegedly attributable to the construction by the Canadian Government in 1903-4 of Gut Dam in the St. Lawrence River near Prescott, Ontario, have reached the arbitral stage. The first sitting of the Lake Ontario Claims Tribunal (United States and Canada) took place in Ottawa on 11 January 1967 in accordance with the provisions of the Canada-United States Agreement signed in Ottawa on 25 March 1965⁴ and brought into force

arising out of banking transactions and miscellaneous commercial claims; (3) debts owed by enterprises which have been nationalized or taken by Hungary and debts which were a charge upon property which has been nationalized or otherwise taken by Hungary.

¹ See generally 'International Claims', *External Affairs*, 9 (1957), p. 326.

² Professor (now Judge of the International Court of Justice) Philip C. Jessup has suggested: 'It should be one of the tasks in the codification of international law to catalogue the types of direct injuries to states for which the state would be privileged to require another state to pay such indemnity as might be determined by an international tribunal to be appropriate to the case', *A Modern Law of Nations*, (1949), p. 120. One of the types mentioned by Judge Jessup is the *I'm Alone* arbitration in which it was held that the sinking of the Canadian-registered ship by a United States Coast Guard cutter was an unlawful act, the tribunal awarding damages for the losses suffered by the captain and crew and also calling for an apology by the United States to Canada and the payment to the Canadian Government of \$25,000 'as a material amend in respect of the wrong'; Joint Final Report of the Commissioners dated 5 January 1935.

³ The combination of facts giving rise to an international claim is often striking. For instance Canada has sponsored the claim of a Canadian whose cattle stampeded when a United States weather balloon landed in his pasture.

⁴ This organizational meeting was presided over by the Chairman, Dr. Lambertus Erades, Vice-President of the Rotterdam District Court, the Netherlands, who has been appointed jointly by the Governments of Canada and the United States. The Canadian national member is the Honourable W. D. Roach, a retired Judge of the Court of Appeal of Ontario, and Professor Alwyn Freeman of Johns Hopkins University is the United States national member. See 'Lake Ontario Claims Tribunal', *External Affairs*, 19 (1967), p. 90. See also 'Canada-U.S. Agreements on Gut Dam Claims', *ibid.* 17 (1965), p. 183, at p. 184: 'There are also on record complaints concerning damage allegedly attributable to Gut Dam from residents of Canada owning real estate on the north shore of Lake Ontario. Claims by Canadians against the Canadian Government will not be considered by the tribunal. However, if its findings make it desirable to do so, the Canadian Government will at that stage consider the establishment of special procedures for Canadian claimants. In the end, Canadian claimants will receive treatment no less favourable than that accorded to United States claimants.'

through exchange of instruments of Ratification on 11 October 1966.¹ The claims against Canada are based on the contention that Gut Dam, which was constructed as a means of improving navigation in the St. Lawrence, was partly responsible for unusually high water levels on Lake Ontario in 1951-2 resulting in damage to shore property. The dam was removed in 1953, partly because of the St. Lawrence Seaway Development.

ESPOUSAL OF CLAIMS

With no permanent international machinery available to adjudicate claims, the injured individual's traditional and often only recourse is to persuade the State of which he is a national to take up his claim through the diplomatic channel.² Before the State is entitled to espouse his claim, the claimant must show that he has exhausted whatever remedies may be available to him in the foreign State. Once this has been done or it becomes evident that no such remedy is available³ the claimant must meet the requirement of continuous nationality. The Canadian Government, in the face of international practice, has felt constrained on a number of recent occasions to reiterate publicly that the claimant seeking governmental espousal of his claim must establish that the injury or loss was suffered by a

¹ For discussions of the Gut Dam Claims see Macdonald, 'Canada's Recent Experience in International Claims', *International Journal* 21 (1966), p. 322, especially at pp. 329-34; R.B. Lillich, 'The Gut Dam Claims Agreement with Canada', *American Journal of International Law*, 59 (1965), p. 892.

² R. B. Lillich, 'International Claims: A Comparative Study of United Kingdom and United States Practice', *Current Legal Problems* (1964), p. 157, at p. 158. Exceptionally under, a specific treaty, individuals may be permitted to put forward claims themselves. For example, the Central American Court of Justice under the Convention of 20 December 1907 was given jurisdiction, *inter alia*, 'over cases between a government and an individual who was a national of another State, either if they were cases of an international character, or if they concerned alleged violations of a treaty or convention; in such cases, it was not necessary that the individual's claim be supported by his own government, but it was essential in a claim against a government that local remedies should have been exhausted or that a denial of justice should be shown. 'By common accord any case between a contracting government and an individual might be submitted to the Court', Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), p. 49. As noted by Hudson (p. 52), five cases were brought before the Court by individuals prior to its termination in 1917, and 'in each of them the plaintiff's case was declared to be inadmissible'. Again, when an arbitration tribunal or a commission has been established to deal with a certain category of claims, individuals have not infrequently been given a right of access to the tribunal or commission, either under the control of their State or on their own; e.g. the Mixed Arbitral Tribunals established under the Versailles Treaty and the European Commission of Human Rights.

³ Castel, *op. cit.* above, p. 369, n. 1, at p. 1031: 'There are certain exceptions to the general rule requiring that a claimant exhaust local remedies. They are such cases in which it is satisfactorily established that:

1. Justice in the local courts is wholly lacking.
2. The injury was caused by the arbitrary and unjust action of the higher officials of the foreign government and there appears to be no adequate ground for believing that a sufficient remedy is afforded by judicial proceedings.
3. The local courts have been superseded by military or executive authorities.
4. The local courts are menaced and controlled by a hostile mob.
5. Local remedies are insufficient, etc.'

Canadian national at the date the claim arose and that the claim has been continuously held by a Canadian national until the date of its 'presentation, adjudication or settlement'.¹ This position accords with that taken by the Permanent Court of International Justice in the *Panevezys-Saldutiskis Railway Co.* case² and by a number of international arbitral tribunals.³ Once espousal of a claim takes place, the State normally assumes full control over its disposition,⁴ and the aggrieved individual may or may not be kept informed of developments in the efforts being made to obtain satisfaction, since risk of disclosure could be prejudicial to the institution or course of negotiations, which are often delicate, with the government responsible for the injury or loss.

Admittedly the continuous nationality principle operates to preclude State espousal of many claims that are otherwise meritorious.⁵ However, the principle is today so deeply embedded in the practice of States that early acceptance of a more liberalized principle would seem to be out of the question. A foreign ministry which failed to subscribe fully to the generally accepted rule would soon find that, except perhaps for some treaty claims⁶ or an occasional claim inadvertently included and advanced with a large group of claims, progress in negotiating settlement of claims lacking continuity of nationality was virtually impossible.⁷ While this

¹ Erich B. Wang, 'Nationality of Claims and Diplomatic Intervention—Canadian Practice' *Canadian Bar Review*, 43 (1965), p. 136, at p. 137. This article refers to instances in which the Canadian Government has indicated support for the principle of continuous nationality.

² *P.C.I.J.*, 1939, Series A/B, No. 76, p. 16; see also the dissenting Opinion of Judges De Visscher and Rostorowski, p. 29.

³ E.g. in the *Forests of Rhodope* case, I.L.R. 7 (1933-4), p. 95, and the *Stevenson* claim, R.I.A.A. 9 (1902), p. 494; cf. also 'Basis of Discussion No. 28 at the Hague Codification Conference on the Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners', *American Journal of International Law*, 24 (1930), Supplement, p. 70.

⁴ According to Nielsen's *Report* (1926), pp. 272-3, a deputation from the Canadian Cayugas appeared before the Tribunal at the commencement of argument and presented a document withdrawing the claim. The Tribunal refused this request and said in part:

'This Tribunal is constituted by virtue of a treaty between the United States and Great Britain and can recognize no other parties to the controversies before it. If those on whose behalf Great Britain makes these claims desire them withdrawn, application must be made to that government, not to us. Great Britain derives authority to present these claims not from the Cayuga Nation or its representatives but from the principles of international law, and presents them, not as the agent of the Cayuga Indians, subject to having its authority revoked, but as a sovereign, legally authorized and morally bound to assert and maintain the interests of those subject to its authority. How and when it shall move to assert those interests is, so far as other states and this Tribunal are concerned, a matter exclusively for the determination of that sovereign. We must decline to receive the paper in question, and it is so ordered.'

⁵ Judge Jessup has pointed out that 'Members of the *Institut de Droit International* in 1932 questioned the rules on the nationality of claims on the ground that they reflected the basic artificiality of the law governing the diplomatic protection of citizens abroad', *Annuaire de l'Institut de Droit International*, (1932), pp. 479 et seq., cited by Jessup, *A Modern Law of Nations*, p. 99, n. 18.

⁶ Cf. Wang, loc. cit. in n. 1 on this page, at pp. 147-8, discussing the exception provided for certain classes of claims under the Peace Treaty with Hungary.

⁷ The United States Department of State in a letter dated 14 September 1966, to the Chair-
[Note 7 continued overleaf]

situation is a reality to foreign ministries it is not always readily appreciated by claimants and their lawyers, who sometimes seem to be perplexed as to the reason why this requirement must be fully met, particularly where the claimant has acquired Canadian citizenship not too long after the effective taking of his property.

The principle of continuous nationality is reflected in the Agreement between the Government of Canada and the Government of the People's Republic of Bulgaria relating to the settlement of Financial Matters, signed in Ottawa on 30 June 1966.¹ Article 1 of the Agreement provides:

'The Bulgarian Government shall pay to the Canadian Government the lump-sum of forty thousand Canadian dollars in full and final settlement of the claims of the Government of Canada, Canadian citizens and Canadian juridical persons against the Bulgarian Government in respect of property, rights, interests, and debts in Bulgaria which have been affected directly or indirectly by Bulgarian measures of nationalization, expropriation or other similar measures which have taken effect before the date of the present agreement.'

Article III is more explicit in its definition of Canadian claimants:

'For the purpose of the present agreement, claims of Canadian citizens and of Canadian juridical persons refer to claims which were owned by Canadian citizens or by Canadian juridical persons on the effective date of nationalization, expropriation or other similar measure and continuously thereafter until the date of the present agreement.'²

NATIONALIZATION CLAIMS

The settlement with Bulgaria is the first and only global settlement directly achieved to date with a communist country by the Canadian Government of post-Second World War claims arising out of nationalization programmes and similar measures.³ As pointed out by Wang,⁴ the man, Subcommittee on Europe, Committee on Foreign Affairs, House of Representatives, pointed out: 'It is the long established policy of the United States Government not to espouse formally claims of persons who were not citizens of the United States when their claims arose. This policy rests on a universally accepted principle of international law and so far as the Department knows has been regularly followed by Western countries in their postwar settlements with Communist countries. While it does not formally espouse such claims, the Department has since World War II tried to persuade the governments with which it has made claims agreements to settle claims of United States nationals who did not have that status when their claims arose. Not a single government has been willing to do so and in each instance the Department reached the conclusion that it would have to exclude them from the lump sum to be paid by the foreign country concerned if a satisfactory settlement was to be obtained for persons who were citizens of the United States when their claims arose.' Letter printed in Appendix to *Report of Subcommittee's Hearing on August 9, 1966 on certain Amendments to the International Claims Settlement Act*. On the general question see also *ibid.*, pp. 41-52. Cf. D. P. O'Connell, *International Law* (1965), vol. 2, pp. 1116-24.

¹ Entered into force on signature (with Agreed Minute and related notes on the establishment of diplomatic relations and of diplomatic and trade representation and on consular matters). To be published in *Canada Treaty Series* (1966), No. 16.

² Cf. Lillich and Christenson, *International Claims: Their Preparation and Presentation* (1962), pp. 8-12.

³ For a review of the present status of negotiations with other Eastern European States, see Donald S. Macdonald, 'Canada's Recent Experience in International Claims', *International Journal*, 21 (1966), p. 322.

⁴ *Loc. cit.* above, p. 368-9, n. 4, at p. 145.

1948 United Kingdom–Yugoslavia Agreement which provided for a lump sum settlement of nationalization claims of ‘British nationals’ was concluded on behalf of United Kingdom nationals and ‘those of other Commonwealth countries’. Wang submits that this settlement ‘may be regarded as a legacy from the earlier dependence upon British diplomacy’.¹

In a recent article² Donald S. Macdonald, Parliamentary Assistant to the Secretary of State for External Affairs, explains the reasons why Canada, unlike other Western countries, has been unable to negotiate settlements of nationalization claims with other East European States:

‘Effective settlement of these claims at an earlier date was not possible because earlier Canadian Governments lacked the more obvious forms of leverage enjoyed by other Western countries to compel foreign governments to recognize our claims. With some at least of the Eastern European countries, nations like the United States or Switzerland, which had under their control large blocked balances of funds belonging to expropriators, were able to negotiate effective settlements. Equally, nations with whom the Eastern European countries had enjoyed favourable trade balances were able to compel recognition of their rights.

What has produced renewed activity between Canada and many of these countries nearly twenty years after the claims first arose has been the change in attitude of the States in Eastern Europe and their evident desire to establish closer diplomatic and trade relations with Canada along with other Western countries. Canada has made it clear that without a settlement of outstanding claims, better diplomatic relations will be harder to attain, and in the past two or three years negotiations have been opened with some of the countries against whom Canadian nationals have outstanding claims.’³

It is evident that Canada has never considered the shelving of these claims for nationalization of property. In fact, the Department of External Affairs has, over the years, built up its records of these claims amounting in the aggregate to millions of dollars, against the day of eventual settlement.⁴ The Department has had the matter under constant review so as to take advantage of any suitable opportunities to press the claims with respondent governments. Some other Western countries have in certain cases with difficulty achieved settlements years ago with Eastern European countries, and the growing number of settlements lends encouragement to hope that Canadian claims will also be settled. The mere passage of time

¹ Wang, *ibid.* For the Agreement, see *Canada Treaty Series* (1948), No. 29. The settlement is discussed in A. Drucker, ‘Compensation for Nationalized Property: the British Practice’, *American Journal of International Law*, 49 (1955), p. 477. Subsequent British compensation agreements with Eastern European countries did not include claims of Canadians.

² *Loc. cit.*, above, p. 374, n. 3, at p. 323.

³ *Ibid.*, p. 324. Settlements are still to be negotiated with Poland, Czechoslovakia, Hungary, Roumania and the Soviet Union. For a description of nationalization programmes, see Samuel Herman, ‘War Damage and Nationalization in Eastern Europe,’ *Law and Contemporary Problems, War Claims* (1951), vol. 16, No. 3, p. 498 (School of Law, Duke University).

⁴ Edward D. Re refers to the United States practice with individual claims as follows: ‘Nevertheless, from the standpoint of the individual claimant, resort to diplomatic channels has proved inadequate to cope with the thousands of claims that arose from the extensive nationalizations following both World Wars’; ‘The Foreign Claims Settlement Commission: Its Functions and Jurisdiction’, *Michigan Law Review*, 60 (1962), p. 1079, at p. 1082.

will not bar the claims.¹ Moreover, while far from comforting to claimants, it is well to remember that in the history of international claims there have been many that have taken a longer period before settlements were achieved. Foreign ministries, unfortunately, have been conditioned to acceptance of the long-term view in this field. Various factors may be responsible for delay in settlement, not the least important being that submission of a claim by the espousing State often may have to await the moment when relations with the State at fault are thought to be propitious for the initiation of negotiations.² As regards post-Second World War nationalization claims the far-reaching economic programmes of communist States impaired private property concepts to such a degree that it was perhaps inevitable that there would be some reassessment of the well-established principle of 'prompt, adequate and effective compensation' generally adhered to by Western States. Moreover, it could not reasonably be expected that communist States, some with their economies severely damaged during the war, would be able, let alone willing, to meet the requirement of 'prompt, adequate and effective compensation'.³ The problem has been neatly put by Professor Jimenez de Arechaga in a working paper submitted to the International Law Commission in 1962:

'The main criticism levelled against this requirement of prompt and adequate compensation is that, although it may be applicable to individual expropriations, it would make it impossible to adopt basic reforms or to take nationalization measures on a wide scale and of a general and impersonal character . . .

'In some academic circles in the United States, an alternative has been proposed to the requirement of prompt compensation. The 1961 Harvard Research Draft Convention on the responsibility of States for damages caused to the person or property of foreigners, proposes, according to the traditional view in that country, that compensation must be prompt, adequate and effective. However, the draft admits that if property is taken by a State in furtherance of a general programme of economic and social reform, the just compensation may be paid over a reasonable period of years in the form

¹ Cf. Whiteman, *Damages in International Law* (1937), vol. 1, pp. 222-47.

² W. W. Bishop, *Cases and Materials on International Law* (2nd ed., 1962), p. 741, comments: 'In its decision as to whether to press a claim, and when, and in the conduct of any negotiations or arbitral proceedings, the Department of State acts according to its own discretion, having in mind considerations of our foreign policy and the interests of the United States as a whole.'

³ See L. E. Becker, 'Just Compensation in Expropriation Cases: Decline and Partial Recovery' *Proceedings of the American Society of International Law*, 53 (1959), p. 336. Professor Lillich has suggested: 'A second area where additional research is needed is that of recent lump sum settlement agreements. An extensive study now being conducted under the auspices of the International Legal Studies Programme of the Syracuse University College of Law reveals that over ninety such agreements have been concluded since 1945. Neither the Harvard Draft Convention nor the Restatement give sufficient weight to these agreements, and their use by the Special Rapporteur in his I.L.C. studies seems designed only to undercut the just compensation rule. No longer can it be maintained that these settlements are 'negotiated compromises and as such do not constitute a departure from the traditional international law principle', 'Toward the Formulation of an Acceptable Body of Law concerning State Responsibility', *Syracuse Law Review*, 16 (1965), p. 720, at pp. 735-6 (Symposium: The Law of International Claims).

of bonds bearing a reasonable rate of interest. [*American Journal of International Law*, 55 (1961), p. 545]

'The practice of States confirms that in the case of nationalizations, the payment of deferred compensations has been offered and accepted, even by countries affiliated to the traditional doctrine under consideration. France and Great Britain, for instance, have paid compensation for the measures of nationalization of Bank businesses, air companies, insurance, transportation and steel and coal industries in the form of redeemable bonds, over a number of years, bearing a 3% interest. This formula was accepted by States whose nationals were affected by such nationalization measures, such as Switzerland, United States, Belgium and Canada.'¹

If factors such as the flux in the legal principle concerning the obligation to pay compensation, the staggering total sums involved and the lack of a firmly rooted claims tradition may have played their part, the real explanation for non-success in efforts to initiate serious negotiations with communist countries on settlement of nationalization claims is to be found in the lack of effective political, economic and other bargaining levers which were available to other western countries.

Judging from experience, it may be optimistic to expect that early settlements with other communist countries, including Hungary, Roumania, Poland, Czechoslovakia and the Soviet Union, are in the immediate offing.² Even when negotiations are finally commenced with representatives of the Government concerned, the most difficult part of the task sometimes lies ahead. Various legal questions have arisen on occasion in the past, such as exhaustion of local remedies³ and the effect to be given to the nationalization legislation of the foreign expropriating country purporting to affect property abroad, including that located in Canada.⁴ Macdonald, by way of

¹ I.L.C. Doc. (xiv)/S.C.I./Wp. 1, quoted in Castel, *op. cit.* above, p. 369, n. 1, at p. 987.

² Cf. Macdonald, *loc. cit.* above, p. 374, n. 3, at pp. 326-9.

³ Lillich and Christenson have observed: 'The customary international law rule regarding local remedies grew up in an age when claims were few in number and when countries had a common interest in respecting and preserving the integrity of every other country. In some respects, changed political and economic conditions have modified the assumptions underlying the traditional view. The local remedies rule would serve no purpose at all today with respect to communist countries which would use it as a weapon to delay international discussions of claims. Nor would its purpose be served when an underdeveloped country unable to pay claims is involved. Thus the rule's rationale seems pertinent today only with regard to Western-oriented countries which continue to respect each other as political units and which have the resources to compensate claimants.'

With the above in mind, the increasing United States practice has been to negotiate lump sum settlements of claims of American nationals without requiring the exhaustion of local remedies. While such settlements recently have involved communist countries, underdeveloped or non-aligned nations needing assistance from the United States may well wish to agree to compensate Americans for any property expropriated in order to clear the way for United States aid. Here again the exhaustion of local remedies might be waived. Hence, with the exception of claims based upon isolated occurrences, the trend today seems to be away from the strict enforcement of the traditional local remedies rule., *op. cit.* above p. 374, n. 2, at pp. 97-8.

⁴ As far as Canadian courts are concerned Castel, *op. cit.* above, p. 369 n. 1, at p. 1008, submits: 'A State can only effectively nationalize assets which are located within its own territory at the time of the nationalization. Canadian courts will not recognize or enforce a foreign nationalization that is unlawful, i.e., of a purely confiscatory nature.' In the case of *Laane and*

[Note 4 continued overleaf]

illustrating these difficulties, refers to the legal issues that have arisen in the negotiations with Hungary, including dual nationality, the provisions of Hungarian law declaring as Hungarian 'even native-born Canadians of Hungarian descent' and the problem of obtaining evidence from Hungarian sources, such as land registries, to satisfy proof of claims.¹ The avoidance of the latter difficulty is one reason why lump sum settlements are looked on with favour. The difficulty that Canadian claimants find in obtaining documentation from communist countries in support of their claims continues to be something of a problem. In some countries like Poland, where there was heavy damage by bombing during the Second World War, land registry and other records were destroyed. However, the time has perhaps passed when claims submitted to a communist State have brought forth requests for more and more evidence in support of the claims and the suspicion may arise whether these requests are not a stalling tactic. The difficulty of obtaining documentation is increased by the fact that in some countries not very long after the nationalization legislation was passed the majority of lawyers were subjected to stringent governmental supervision, including organization into legal co-operatives. In view of this, it is perhaps only to be expected that they should become increasingly reluctant to give their services in matters that might bring upon themselves the displeasure of governmental officials. Inquiries to the rapidly diminishing number of lawyers in private practice were discouraged and lawyers' co-operatives were designated as addresses to which inquiries about documentation might be directed.

The problem of documentation confronted other countries, such as the United Kingdom, which effected lump sum settlements of nationalization claims. Under such a lump sum settlement, the expropriating State agrees to pay a part of the total amount of the claims, leaving it to the espousing State to allot the money to entitled claimants. For this purpose, domestic claims agencies are usually given the responsibility of examining the evidence in support of claims and of making awards to claimants who establish their right to compensation out of the funds received. The result is that entitled claimants receive partial satisfaction for their claims. Under such a settlement, the claimant may not be held to the same standard of supporting documentation as in the case where it is attempted to obtain

Baltser v. Estonian State Cargo & Passenger S.S. Line, [1949] S.C.R., 530, the Supreme Court of Canada considered the question as to the effect to be given in Canada to a 1940 nationalization decree enacted by the Estonian Government nationalizing all Estonian merchant ships, including those in foreign ports, and fixing the compensation therefor at 25 per cent of each ship's value. The Supreme Court held that the decree was of a confiscatory nature and had no extra-territorial effect because the amount of compensation offered was inadequate. Another problem that has arisen in the past is what action amounts to a taking of property so as to justify diplomatic espousal of a claim. See G. C. Christie, 'What Constitutes a Taking of Property under International Law', this *Year Book*, 38 (1962), p. 307.

¹ Loc. cit. above, p. 374, n. 3, at pp. 326-8.

compensation from the nationalizing State on an individual basis. However, in the last few years certain countries have co-operated by confirming that their land registries are open to search by Canadian citizens. Thus, the recent agreement concluded between Canada and Bulgaria in settlement of claims provides in Article V, paragraph (2):

‘To facilitate the distribution of this amount the Bulgarian Government shall, at the request of the Canadian Government, furnish as soon as possible such documents and such details of title and of value as are held by the appropriate Bulgarian authorities so as to enable the Canadian Government to determine any claims of Canadian citizens.’¹

WAR CLAIMS

‘The settlement of claims arising out of the Second World War presented problems even more intractable than those that followed the First World War.’² Whereas the claims following the First World War were provided for not long after the termination of hostilities by the Versailles Treaty and by treaties with the other defeated enemy countries, the absence of any peace treaties with Germany and Japan establishing a definitely agreed source of reparation or compensation for war damage made for a period of uncertainty and indecision. At the termination of hostilities, however, many of the Allied Powers, including Canada, found themselves in control of enormous sums in vested or frozen assets, which had formerly belonged to enemy States and their nationals. The question of German reparation was discussed in November–December 1945, at the Paris Conference which led to the signature by eighteen States, including Canada, of the Paris Agreement on German reparation, to which Germany was not a party. Article 6A, Part I, of the Agreement provided:

‘Each signatory government shall under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control.’³

¹ To be published in *Canada Treaty Series* (1966), No. 16.

² ‘International Claims’, *External Affairs*, 9 (1957), p. 328. The American writer W. W. Bishop has observed: ‘The international law relating to war claims appears to be one of the least satisfactory parts of the law of state responsibility and international claims. Both international wars and civil wars usually entail extensive destruction of property and widespread personal injury and violent death . . . when such claims are adjusted through negotiation, or by commissions or tribunals established pursuant to the terms of peace or special treaties with affected neutrals, the parties are more likely to be guided by considerations of politics, of who won and who lost, or by the “moral climate of opinion” incidental to the termination of the hostilities, than they are by any general rules of international law’, *op. cit.* above, p. 376, n. 2, at pp. 695–6.

³ *Canada Treaty Series* (1945), No. 23, p. 16. The Assembly of the Inter-Allied Reparation Agency which was established by the Paris Agreement approved, on 21 November 1947, rules of accounting for German external assets, which entitled the signatories to exclude certain categories of German enemy assets from their shares, such as household goods and limited personal effects of diplomatic and consular officials of the German Government and assets belonging to religious bodies or private charitable institutions and used exclusively for religious or charitable purposes.

While Germany was not a party to the Paris Agreement, the German Federal Republic signed agreements with the Western Occupying Powers at Bonn and Paris in 1952 and in 1954¹ by which it agreed, among other things, to 'raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries . . .'.² The Federal Republic also undertook to 'ensure that the former owners of property seized' would 'be compensated'.³

The 1951 Peace Treaty with Japan, which was signed by Canada,⁴ conferred on the Allied Powers 'the right to seize, retain, liquidate or otherwise dispose of' Japanese assets, with certain exceptions. On the other hand, Canada agreed to return Italian⁵ and Finnish⁶ enemy assets, Italy agreeing to make a lump-sum settlement of 290 million lire in respect of Canadian war damage claims against her.⁷

In view of the desirability of a comprehensive review of the problems, including questions relating to the source of funds for early payment of war claims, the Canadian Government, on 31 July 1951, appointed Chief Justice Ilesley of Nova Scotia, Advisory Commissioner on War Claims. The Order-in-Council authorizing the appointment of Chief Justice Ilesley noted that the Secretary of State had reported that 'arising out of World War II, many claims have been asserted by Canadians, hereinafter referred to as War Claims in respect of death, personal injury, maltreatment, and loss of or damage to property' and 'that in respect of some of these claims partial compensation is provided for and may be obtained under

¹ Convention on the Settlement of Matters Arising out of the War and the Occupation signed at Bonn, 26 May 1952, as amended by Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany signed at Paris 23 October 1954 (in force 5 May 1955), *United Kingdom Treaty Series* (1959) No. 13.

² Article 3, Chapter VI—Reparation.

³ Article 5. See also D. P. O'Connell, *op. cit.* above, p. 373, n. 7, at p. 846, n. 55.

⁴ *Canada Treaty Series* (1952), No. 4.

⁵ Exchange of Notes (20 September 1951) between Canada and Italy Constituting an Agreement for the Settlement of Certain War Claims and the Release of Italian Assets in Canada; *ibid.*, No. 21, Article 3: 'Upon the signing of this Agreement, the Canadian Government will announce in the Canada Gazette, the release of all the Italian assets sequestered, seized by or under the control of the Canadian Custodian, the actual release to start immediately and to be effected upon individual application, and to be terminated in the shortest possible time; the Canadian Government taking all necessary measures to this effect'.

⁶ Article 27 of Treaty of Peace with Finland signed at Paris, 10 February 1947, *ibid.* (1947), No. 7.

⁷ See Vote 697, the Appropriation Act, No. 4, Statutes of Canada 1952 Chap. 55; also the War Claims (Italy) Settlement Regulations (P.C. 1954-1723), 18 November 1954, *S.O.R. Consolidation* (1955), vol. 3, p. 2856, revoking the War Claims (Italy) Settlement Regulations established by Order in Council P.C. 5818, 6 November 1951, as amended; amended by P.C. 1955-977, 30 June 1955, *S.O.R.* 55/249 13 July 1955; P.C. 1960-1019, *S.O.R.* 60/338 10 August 1960.

treaties of peace or other international instruments but that in respect of the bulk of them no provision for compensation has been made'.¹ Less than seven months later, Chief Justice Ilesley submitted a thorough report² to the Canadian Government, which adopted his recommendations, with a few minor modifications³ including his recommendation that German and Japanese enemy assets be utilized to pay claims of Canadian citizens. Accordingly, the transfer of these assets to a War Claims Fund to be established, was authorized.⁴ Similar provision was later made for the transfer of Hungarian and Roumanian vested assets⁵ to the War Claims Fund to reimburse it for amounts that claimants were entitled to receive under the Treaties of Peace with those countries. The amount of German, Hungarian and Japanese assets transferred to the War Claims Fund by the end of 1966 was \$10,550,692.00. No Roumanian assets have been so transferred.⁶

¹ Order-in-Council P.C. 3951 of 31 July 1951.

² *Report of the Advisory Commission on War Claims* (25 February, 1952).

³ See *ibid.* See also *S.O.R. Consolidation* (1955), vol. 1, p. 134, P.C. 1954-1809, amended by S.O.R. 1955, p. 1477, S.O.R. 1956, p. 464, S.O.R. 1958, p. 1250.

⁴ Order-in-Council P.C. 1953-434 of 26 March 1953 made under the authority of Vote 696 of the Appropriation Act, No. 4, 1952, Chap. 55 of the Statutes of Canada of 1952. Vote 696 reads:

'To authorize

- (a) the Custodian of Enemy Property to transfer to the Minister of Finance such property, including the proceeds and earnings of property, that is vested in the Custodian in respect of World War II as the Governor in Council prescribes;
- (b) the Minister of Finance to hold, sell or otherwise administer property received by him from the Custodian under paragraph (a) or from other sources by way of reparations by former enemies (except Italy) in respect of World War II and,
- (c) the Minister of Finance to establish a special account in the Consolidated Revenue Fund to be known as the War Claims Fund, to which shall be credited all money received by him from the Custodian under paragraph (a) or from other sources by way of reparations by former enemies (except Italy) in respect of World War II, the proceeds of sale of property under paragraph (b); the earnings of property specified in paragraph (b) and amounts recovered from persons who have received overpayments in respect of claims arising out of World War II:

and, notwithstanding section 35 of the Financial Administration Act, to provide for payments out of the War Claims Fund in the current and subsequent fiscal years, in accordance with regulations of the Governor in Council, to persons who claim compensation in respect of World War II, for the payment out of the War Claims Fund in the current and subsequent fiscal years of expenses incurred in investigating and reporting on claims of those persons and for the repayment out of the War Claims Fund to Vote 128 (miscellaneous minor and unforeseen expenses) of all amounts that have been paid out of that Vote pursuant to The War Claims Interim Compensation Rules established by Order in Council, P.C. 667 of February 4, 1952'.

⁵ Appropriation Act, No. 3, 1953, Vote 657, Chap. 54, Statutes of Canada: 'To authorize the Custodian to transfer to the Minister of Finance from time to time, such of the assets (and the proceeds of liquidation thereof and earnings thereon) vested in him in respect of World War II that were formerly owned by residents of Hungary or Roumania as the Minister of Finance prescribes, the proceeds thereof to be credited to the War Claims Fund to reimburse the Fund pro tanto for amounts that claimants are entitled to receive from Hungary and Roumania under the Treaties of Peace but which have been paid to the claimants out of the War Claims Fund under the War Claims Rules, and for the expense of investigating their claims.' . . . See *Treaties of Peace (Italy, Roumania, Hungary and Finland) Act 1948*, Statutes of Canada 1948, Chap. 71; also *Treaties of Peace (Italy, Roumania, Hungary and Finland) Regulations*, P.C. 2995, 16 June 1949, *S.O.R. Consolidation* (1955), vol. 3, p. 2855.

⁶ There was no valid Canadian war damage claim against Roumania. Assets transferred by the

[Note 6 continued overleaf]

In October 1952 Chief Justice Campbell of Prince Edward Island was appointed Chief War Claims Commissioner¹ and directed to:

'... inquire into all particular claims on the War Claims Fund that may be referred to him, and that he report in respect of each such claim to the Secretary of State stating whether in his opinion the claimant or other person is eligible under the rules referred to in section three of the War Claims Regulations established by Order in Council P.C. 4267 of 9th October 1952 to receive a payment out of the War Claims Fund, together with the reasons for his opinion and his recommendation as to the amount that in his opinion should be paid in respect of each such claim'¹

Chief Justice Campbell was also appointed Advisory Commissioner on Claims under the Treaty of Peace with Italy 'to inquire into and make reports and recommendations to the Minister of Finance concerning the matters specified in the War Claims (Italy) Settlement Regulations'.¹ The deadline for notifying claims to the War Claims Commission under the War Claims Regulations was finally set at 30 November 1954.²

It is understood that the War Claims Commission has completed its task. Some idea of the magnitude of that task may be obtained from the *Report of the Advisory Commission* published in 1952. The *Report* points out that it took the War Claims Branch in the Department of the Secretary of State, which was established in September 1948, a considerable time to tabulate the claims received:

'... war claims had been filed with several government departments and agencies. In order to collect and analyse these claims it proved necessary to examine thousands of files, and write thousands of letters, and in many cases to make enquiries from missions abroad. Further enquiries had to be made in many cases to check up on the national status of claimants at time of loss and on many other items of information. Again, it was considered that estimates of losses should be shown in Canadian dollars. This presented difficult problems since war claims, as filed, had been made in about 30 currencies, some of which had disappeared as a result of monetary reforms or extreme depreciation. Then in some cases it was difficult to ascertain whether the claimant was claiming in pre-war or post-war terms of the currency in which he claimed. Another obstacle to the speedy analysis of the war claims filed was the difficulty or impossibility of obtaining information about property left behind or lost in countries which had come under Communist control. Nevertheless estimates of losses were finally produced. . . .'³

As in the case of the Reparation Commissions which followed World War I, the work of the War Claims Commission will no doubt be publicized in due course.⁴

Custodian do not include moneys received from other sources by way of reparation and credited to the War Claims Fund.

¹ Commission dated 23 October 1952, issued pursuant to Order-in-Council P.C. 4354 of the same date

² Schedule to War Claims Regulations (P.C. 1954-1809 of 23 November 1954). Also War Claims (Italy) Settlement Regulations (P.C. 1954-1723 of 18 November 1954 and amendments thereto).

³ *Report of the Advisory Commission on War Claims* (1952), p. 2.

⁴ Prime Minister Pearson stated in reply to a question in the House of Commons on 19 November 1963: 'Since 1952, Mr. Speaker, some 7000 Canadians have received from the German war

CLAIMS UNDER THE TREATY OF PEACE WITH JAPAN

The Treaty of Peace with Japan signed by Canada at San Francisco on 8 September 1951¹ contained detailed provision for the satisfaction of claims. Of particular interest are Articles 15 and 18 (a).

Under Article 15, Japan undertook to return the property in Japan of 'each Allied Power and its nationals which was within Japan at any time between 7 December 1941 and 2 September 1945 unless the owner has freely disposed thereof without duress or fraud'. It was further provided that 'in cases where such property was within Japan on 7 December 1941, and cannot be returned or has suffered injury or damage as a result of the war, compensation will be made on terms not less favourable than the terms provided in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on 13 July 1951'. Accordingly, a number of claims were submitted to the Japanese Government under the Allied Powers Property Compensation Law. Subsequently, satisfactory settlements were received by Canadian claimants² except in a few cases where the amounts offered by the Japanese Government were unacceptable. Eventually, five claims were referred by the Canadian Government to a Canadian-Japanese Property Commission in Tokyo, a claims specialist being assigned from the Department of External Affairs in Ottawa to represent the Canadian Government before the Commission and to draft the highly technical and complex submissions. Before the Commission held any hearings, however, the Japanese Government made improved offers in respect of these claims, which were accepted by the Canadian Government.

CLAIMS ARISING OUT OF THE SINO-JAPANESE 'INCIDENT'
OF 1937-41

A number of Canadians had also suffered losses during the Sino-Japanese 'incident' of 1937-41. Claims arising out of this 'incident' were considered to come within Article 18 (a) of the Treaty of Peace with Japan, which provided:

'... The intervention of a state of war shall equally not be regarded as affecting the claims fund compensation for war losses under the Nazi régime, including maltreatment, amounting to almost \$9 million.' *Hansard*, H.C., 19 November 1963, p. 4902. See also 'International Claims', *External Affairs*, 9 (1957), p. 326, at p. 329: 'As it was impossible to foretell how much would eventually find its way into this [War Claims] Fund, let alone the total of the claims which would eventually be found to be valid, a strict system of priorities was established in particular with regard to property claims. In practice, this system has worked well: under it all death, personal injury and maltreatment claims have been paid in full, while all valid property claims up to an amount of \$30,000 have been paid.' Eventually all property claims were paid in full.

¹ Ratified on 17 April 1952, *Canada Treaty Series* (1952), No. 4, implemented by Chap. 50, Statutes of Canada, 1952, in force 28 April 1952.

² For example, one Canadian firm which lost a shipment of brushes stranded in Japan because transshipment could not be arranged prior to the outbreak of war, received compensation in 1954 amounting to Japanese ¥11,188,047.00 (U.S. \$31,008).

obligation to consider on their merits claims for loss or damage to property or for personal injury or death which arose before the existence of a state of war, and which may be presented or re-presented by the Government of one of the Allied Powers to the Government of Japan, or by the Government of Japan to any of the Governments of the Allied Powers. The provisions of this paragraph are without prejudice to the rights conferred by Article 14.¹

The Department of External Affairs in a Notice published in the *Canada Gazette* for 9 January 1960, about the deadline for submission of claims to the Department (29 February 1960), pointed out:

'Any such claim would probably, although not necessarily, be one for compensation for death, personal injury, or damage to Canadian-owned property in China arising out of hostilities during the so-called Sino-Japanese "incident" from 7 July, 1937, until the time of the outbreak of the Pacific War.'

A guide to claimants issued by the Department of External Affairs, shortly after the Peace Treaty with Japan came into force, provides some indication of the difficulties envisaged in establishing claims that were then in some cases more than fifteen years old:

'... Too much stress cannot be laid on the necessity of submitting ample and corroborative evidence of all material facts alleged, including the sworn statements of persons in a position to testify from personal knowledge or observation. Formal claims should be prepared with the thought in mind that every possible factual and legal defense may be advanced by the Japanese Government and that that Government may test every material point involved. It is, of course fully appreciated that corroborative evidence may not be obtainable due to the fact that most of the losses took place in China some fifteen years ago.'

As matters turned out, there were only a relatively small number of Canadian claims which appeared to be eligible and in due course five claims, having a total value of some 50,000 dollars, were presented to the Japanese Government through the Canadian Embassy in Tokyo. Progress toward settlement was slow, perhaps because of the existence of claims of other countries under Article 18 (a). There is always the possibility that a respondent State will wish to adopt a definite position on the more numerous and larger claims of one State before it is prepared to discuss seriously the smaller claims of other countries. The British claims under Article 18 (a) were eventually settled for £500,000. The following is extracted from an item in the *London Times* of 8 October 1960:

'Since the peace treaty came into force in 1952, negotiations for a settlement have been prolonged, and little progress was made until a short time before Mr. Kishi, as Japanese Prime Minister, visited the United Kingdom in July, 1959. The Japanese claimed originally that they were not bound to pay any compensation, as in their opinion, the China incident was a war. In view of this British representatives were maintaining yesterday that the compensation obtained is satisfactory and they were

¹ *Canada Treaty Series* (1952), No. 4.

glad that "this long-standing irritant in Anglo-Japanese relations has been removed." The Foreign Office is communicating with all those concerned whose address is known, and trying to make contact with others. There were about 440 claims for about £1,000,000 in all, excluding interest.'

In 1961 the Canadian claims were revised in amount to just under 40,000 dollars, and under an arrangement signed in Tokyo on 5 September 1961 Japan agreed to make a lump sum payment by the end of November 1961 of 17,500 U.S. dollars 'in settlement of all such claims by the Government of Canada, as well as by Canadian physical and juridical persons, including juridical persons of Canadian character for which the Government of Japan are responsible according to international law'.

SHOOTING DOWN OF AN ISRAELI AIRLINER

Claims for the deaths of four Canadians, all residents of Montreal, arose out of the destruction of an 'El Al' Israel Airlines Constellation, shot down apparently by Bulgarian fighter aircraft on 27 July 1955. The claims were initially submitted to the Bulgarian Government in 1956 through the British Legation in Sofia, in the absence of Canadian diplomatic representation. Settlement was reached only in 1962 after extensive and intermittent negotiations, overshadowed for a time by the proceedings instituted at the International Court of Justice by Israel, Britain and the United States against Bulgaria with respect to their own similar claims. The Canadian negotiations resulted in a break-through in post Second World War Canadian claims against communist States, the settlement being effected directly by Canada.

The negotiations illustrate the great difficulties often involved in arranging a settlement through the diplomatic channel. The disaster, in which nationals of about ten countries perished, was attributable to 'cold war' tensions, and aroused sharp passions in some of the victims' countries. In Israel feelings ran high, as will be gathered from the following extract from a cable from the Prime Minister and Minister of Foreign Affairs to the President of the Council of I.C.A.O. which was reproduced in a press release issued by the Israel Embassy in Ottawa:

'On Wednesday, 27 July, an "El Al" Israel Airlines Constellation proceeding to Istanbul from Vienna on a scheduled New York-Lod flight, transmitted an SOS radio message at 0537 hours G.M.T., which was picked up at Athens and relayed to Lod. . . . Immediately after, the plane was shot down by Bulgarian Security Forces in the vicinity of Tirbinovo near the Greco-Bulgarian frontier. This was subsequently admitted in the Bulgarian Government's public statement of 28 July. The plane was destroyed with no survivors, causing the loss of lives of the 51 passengers and 7 crew.

'The Israel Government today delivered to the Bulgarian Government a vehement protest at the shocking recklessness and the wanton disregard of human life and elementary obligations towards humanity, which should have governed the conduct of their

Security Forces, and at the refusal of the Bulgarian authorities to allow an Israel Commission of Enquiry, presently at the frontier, to enter Bulgarian territory for the purpose of proceeding to the site of the disaster. The Israel Government also demanded full satisfaction, reserving the right to take whatever steps were necessary to that end.¹

It was only to be expected that the public throughout the world would be alarmed by such an incident, with its implications for the principle of the safety of international civil air travel. Canada, a State with fast-growing interests in international commercial aviation, was particularly concerned to maintain the principle. Obtaining satisfaction from Bulgaria was therefore no less important to the Canadian public interest than to the Canadian claimants.

Ordinarily, the general state of relations between East and West might have dampened hopes that compensation would be quickly obtained from Bulgaria. However, there was encouragement in the fact that on 3 August the Bulgarian Government made a radio announcement that the persons responsible would be punished. The broadcast claimed that the two intercepting Bulgarian fighter aircraft had warned the plane to land 'through the established international signals' but at the same time admitted: 'The organs of the anti-aircraft defence were too hasty. They did not take all the necessary measures to force the plane to land.' The announcement reiterated the Bulgarian Government's earlier offer in a Note to the Israel Government to pay compensation to the families of the victims as well as to pay a share of the material damage. The profound regret of the Bulgarian Government and people for the disaster and the 'death of innocent people' was again expressed, together with the ardent hope that such a disaster would not recur.²

Shortly after the incident, the British Legation in Sofia reserved all the rights of Her Majesty's Governments in the United Kingdom, Canada and the Union of South Africa in the matter of compensation for the loss of British, Canadian and South African lives. In September 1955 lawyers for the next-of-kin of the Canadian victims were informed that 'the Canadian Government intends to lodge a claim for legal damages against Bulgaria, based on the loss sustained by dependents of the victims of the accident and the loss of the latters' baggage and personal effects'.³ Although the Canadian Government was under no obligation to consult the Canadian claimants, they were kept informed of significant developments in the efforts to obtain compensation. On 13 March 1956 the claims were submitted to the Bulgarian Government through the United Kingdom Legation in Sofia. In a press release issued by the Department of External Affairs on 21 March, it was stated that the Canadian Government had

¹ Press Release of 29 July 1955.

² Reported in the *Ottawa Citizen*, 3 August 1955.

³ Department of External Affairs, letter of 9 September 1955, to claimants' lawyers.

submitted claims 'on behalf of Hiram D. Maydeck who lost his wife, Mrs. Sara Maydeck, and two daughters, Anne and Yoffe, in the disaster; and on behalf of Mrs. Evelyn and Irving Altman the widow and son of Max S. Altman, the other Canadian victim'.¹ The Maydeck claim was in the amount of 51,522 dollars and the Altman claim in the amount of 50,800 dollars.

During the following fifteen months no progress was made toward settlement of the claims, as is indicated by the following exchange in the British House of Commons. On 3 July 1957 the Parliamentary Under-Secretary of State at the British Foreign Office replied in part to a question about the British claims:

'The claim was submitted on 12th March, 1956; Her Majesty's Minister at Sofia raised the matter with a Vice-Minister in the Bulgarian Ministry of Foreign Affairs on 21st August, 1956; on 31st January, 1957, he addressed a strong Note to the Bulgarian Government asking for proposals for a settlement as a matter of urgency; and on 15th March, 1957, he again took the matter up with a Vice-Minister in the Bulgarian Ministry of Foreign Affairs.

Mr. Janner: Does not the hon. Gentleman think it is a matter of very serious gravity that two years afterwards no compensation has been paid, in spite of the promise made at the time, to the relatives of the victims who were brought down in a murderous manner without any excuse? Does he not think that pressure should be brought to bear continuously and as effectively as possible on the Bulgarian Government to get compensation for those concerned?

Mr. Harvey: The Bulgarian Government have gone back on their original promise. The question of bringing effective pressure to bear on them involves a certain number of difficulties.'²

Not long after this exchange, the Bulgarian Government made *ex gratia* offers to the countries concerned of 56,000 transferable leva per victim (approximately 8,200 U.S. dollars), 'without prejudice to the question of liability'. Israel's claim for the loss of the aircraft was, however, rejected. The offer of 8,200 dollars per victim is approximately the limit of the liability of air carriers under the Warsaw Convention of 12 October 1929.³

On 16 October 1957 Israel instituted proceedings against Bulgaria in the International Court of Justice in respect of her claims.⁴ Israel's application requested the Court, *inter alia*, to 'judge and declare that the Government of Bulgaria is responsible under International Law for the shooting down of the Israel aircraft and for loss of life and property which resulted therefrom in damages of 2,658,144 dollars which were claimed, and the Government of Israel requests the Court to determine the amount of

¹ Press Release No. 17.

² From a press report.

³ The Hague Protocol of 28 September 1955, which doubled this limit, was signed by Canada on 16 August 1956, ratified on 18 April 1964, and entered into force for Canada on 17 July 1964 (*Canada Treaty Series* (1964), No. 29). The Hague Protocol came into effect generally on 1 August 1963.

⁴ Hudson has pointed out: 'For the purpose of establishing the jurisdiction of the Court, the application invoked the declaration deposited by Israel on 17 October 1956 . . .', 'The Thirty-Sixth Year of the World Court', *American Journal of International Law*, 52 (1958), p. 1, at p. 5.

compensation due to it from the Government of Bulgaria'.¹ Israel's application was based on the premise that Bulgaria's acceptance of the compulsory jurisdiction of the Permanent Court of International Justice in 1921 had carried over to that Court's successor, the International Court of Justice, by Article 36 (5) of the Statute of the new Court. However, in the first of five preliminary objections filed with the Court, Bulgaria submitted that the Declaration of 1921 'ceased to be in force on the dissolution of the Permanent Court, pronounced by the Assembly of the League of Nations on 18 April, 1946' and that 'the *Declaration was therefore no longer* in force on the date on which the People's Republic of Bulgaria became a party to the Statute of the International Court of Justice, and . . . it cannot accordingly be regarded as constituting an acceptance of the compulsory jurisdiction of the International Court of Justice, by virtue of Article 36, paragraph 5, of the Statute of that Court . . .'.²

On 28 October 1957 the United States,³ and on 22 November 1957 the United Kingdom,⁴ instituted similar proceedings at the International Court of Justice in respect to their own claims.

By its Judgment of 26 May 1959 in the case concerning the *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)* the International Court held (12 votes to 4) that it was without jurisdiction in the dispute brought by Israel. In the opinion of the majority of the Court Bulgaria was not bound by the 1921 acceptance, since Article 36 (5) of the new Statute applies only to original members of the United Nations.⁵ In the light of this decision the United Kingdom, by letter of 8 July 1959 to the Court, requested the discontinuance of proceedings in its parallel case and on 3 August 1959 the Court made an Order removing the British case from the Court's list. On the other hand, it was not until 13 May 1960 that the United States also requested the discontinuance of its proceedings and the removal of its case from the Court's list, the Court's Order to this effect being made on 30 May 1960.⁶

¹ From the text of an official announcement made by the Israel Government on 16 October 1957.

² *I.C.J. Reports*, 1959, pp. 131-2.

³ 'For the purpose of establishing the jurisdiction of the Court, the application invoked the declarations deposited by the two states involved accepting the compulsory jurisdiction of the Court: the United States accepted the jurisdiction on 14 August 1946, and Bulgaria accepted it on 29 July 1921', Hudson, loc. cit. above, p. 387, n. 4, at p. 6.

⁴ 'For the purpose of establishing the jurisdiction of the Court, the application invoked the declarations of the two States involved, accepting the compulsory jurisdiction of the Court; the United Kingdom declaration of 18 April 1957, replacing the previous declaration of 3 October 1955, and the Bulgarian acceptance of 29 July 1921', Hudson, *ibid.*

⁵ See L. C. Cafferis, 'The Recent Judgment of the International Court of Justice in the Case concerning the Aerial Incident of 27 July, 1955, and the Interpretation of Article 36 (5) of the Statute of the Court', *American Journal of International Law*, 54 (1960), p. 855; Leo Gross, 'Jurisprudence of the World Court: Thirty-Eighth Year', *ibid.* 57 (1959), p. 751; 'Aerial Incident of 27 July 1955: *Israel v. Bulgaria*', *Duke Law Journal* (1960), p. 240.

⁶ 'See Leo Gross, 'Bulgaria Invokes the Connally Amendment', *American Journal of International Law*, 56 (1962), p. 357.

Should Canada have taken its own claims to the International Court? Was there not some obligation to the international community of nations to lend all possible support to having adjudicated what Leo Gross has described as 'all those beautiful issues relating to the rights and duties of States in the event of aerial intrusion and involuntary overflight . . .'.¹ The Court's judgment in *Israel v. Bulgaria* was, of course, binding only between the parties to that case and this consideration no doubt influenced the United States to continue its proceedings at the Court for some ten months after the British case was removed from the Court's list. It was only after Bulgaria invoked the Connally reservation, embodied in the United States' acceptance of compulsory jurisdiction, that the United States withdrew its own case. This reservation excludes from the Court's jurisdiction matters essentially within the United States domestic jurisdiction, as determined by the United States; and Bulgaria, using her right reciprocally to invoke the reservation, turned it against the United States. It is just possible that Canada might have been in a stronger position at the Court than the United States or Britain. The reason is that there was a more plausible case for the Court's having jurisdiction over a case between Canada and Bulgaria than between any of the other countries that took their claims to the Court and Bulgaria. Canada was represented at the San Francisco Conference and her 1929 Declaration under the old Statute had indubitably been carried over to the International Court.² As a result, Canada's position under the Optional Clause was much closer to that of Bulgaria than that of the United Kingdom, the United States or Israel, none of which was relying on a Declaration made under the old Statute. Moreover, the Canadian acceptance of the Court's compulsory jurisdiction was much less restrictive and contained nothing similar to the Connally reservation. What effect, if any, these differences would have had on the mind of the Court, with judges of diverse nationalities, background, legal training and outlook, is difficult to gauge. If the question is now academic with respect to the Canadian claims, it is not without interest that in the *Temple*³ and *Barcelona Traction Co.*⁴ cases some of the new Judges expressed their disagreement with the *Israel-Bulgaria* decision.

In any event, Canada, instead of taking its own claims to the International

¹ Ibid., p. 362.

² Starke, *An Introduction to International Law* (5th ed., 1963), p. 373: 'According to its decision in the Case Concerning the Aerial Incident of 27 July 1955 (Preliminary Objections) such former declarations are only transferable if made by States parties to the present Statute who were represented at the San Francisco Conference which drew up that Statute, and a former declaration made by any other State party to the Statute lapsed in 1946 when the Permanent Court of International Justice ceased to exist, and on that account.'

³ Judges Alfaro, Wellington Koo, Fitzmaurice, Tanaka and Spender; *I.C.J. Reports*, 1961, pp. 35-42.

⁴ Judges Spender, Wellington Koo and Tanaka; *I.C.J. Reports*, 1964, pp. 47, 51 and 65.

Court, continued to seek a settlement through the diplomatic channel.¹ After all immediately following the disaster the Bulgarians had admitted at least partial responsibility² for the incident. They had offered to pay compensation and there was some prospect of avoiding an undesirable precedent through acceptance of a flat rate per victim obviously related to the limit of liability under the Warsaw Convention. In 1958 the Canadian Permanent Mission to the United Nations in New York was instructed to pursue the question with its Bulgarian counterpart. In late June 1959 the Bulgarian Government offered to pay an additional sum in respect of Max S. Altman. This offer was accepted by Canada in September 1959, and almost three years later the Bulgarian Government turned over to the Canadian Embassy in Washington, for delivery to the claimants against their receipts, two cheques payable in United States dollars in satisfaction of the claims. The cheque in respect of the Maydeck claim was in the amount of 25,703 U.S. dollars and in respect of the Altman claim,³ 16,817 U.S. dollars. The delay in payment, which was made by the Bulgarian Government as a 'humanitarian expression', was mainly attributable to the necessity of agreeing upon the texts of the correspondence recording the settlement.

DEATH OF CANADIAN GOVERNMENT TRADE COMMISSIONER IN CAIRO RIOT

In some instances in which injuries have been received by their officials in foreign States the appointing States have understandably shown the utmost concern to obtain adequate satisfaction. It is generally recognized that foreign officials such as consular and diplomatic officers enjoy a special status as representatives of the State appointing them.⁴ In a number of cases the State has exacted satisfaction on its own behalf as well as on behalf of its injured official. A case often cited in textbooks is that of

¹ It is of interest that Canada never declared war formally on Bulgaria during the Second World War and was not a party to the Treaty of Peace.

² The British Application instituting Proceedings in the International Court of Justice, filed on 22 November 1957, stated in part (p. 6): 'Repeated attempts have been made through the diplomatic channel to reach a satisfactory settlement of this claim . . . The Government of the People's Republic of Bulgaria appear now, however, to have repudiated liability for the shooting down of the Constellation aircraft, and instead of offering compensation on the basis of the losses actually sustained, have proposed without prejudice to the question of responsibility, an ex gratia payment of 56,000 transferable levas in respect of each victim of the incident.'

³ Mrs. Evelyn Altman, the widow of Max S. Altman, died some years before the settlement was concluded.

⁴ Cf. C. G. Fenwick, *International Law* (4th ed., 1965), p. 339: 'The general duty of the State to use due diligence to prevent the commission of wrongful acts to the injury of aliens is increased when the alien happens to be an officer of a foreign State. As a rule the gravity of the case is determined by the rank of the foreign officer; but political conditions sometimes intervene to aggravate what would normally be minor offences.'

Robert Imbrie, a United States Vice-Consul at Teheran, who was killed by a mob in 1924. Imbrie had been present at a religious ceremony and received severe injuries when he was attacked. He was followed into the operating room of the hospital where he had been taken and there beaten to death. The local police appear to have played a passive role during this outrage. The Persian Government quickly accepted responsibility. Severe measures were taken, including the placing of Teheran under martial law and the arrest of a leading Mullah and 200 other persons suspected of participating in the crime. Persia expressed the 'deepest regret' over Imbrie's death and his body was delivered by Persian officials under a guard of honour to an American warship the *Trenton*, which had been dispatched from Naples to transport the body to the United States. Persia paid 110,000 dollars to meet the cost of transporting the body and 60,000 dollars as an indemnity for Imbrie's widow.¹

Jessup has noted that 'in other cases of injuries to consular officers the State has not made a claim on its own behalf, and mixed claims commissions have made awards solely for the benefit of the individual, recognizing at the same time that the defendant State was responsible for not extending adequate protection to such officials'.² A Canadian case involving not a consular official but a trade commissioner is that of the Canadian Government's Trade Commissioner at Cairo, Mr. J. M. Boyer, who was murdered during rioting in that city on 26 January 1952. A number of British subjects and Mr. Boyer were killed when an Egyptian mob attacked the Turf Club and set it on fire. Mr. Boyer was last seen alive at a window in one of the rooms of the Club with a serious head wound, and his body was later found in the room. The life of his assistant, Mr. C. Butterworth, who lived at the Club, was saved with the help of a friendly Egyptian.

The Canadian Government not being directly represented diplomatically in Egypt at that time, the British Ambassador immediately informed the Egyptian Government on behalf of the British and Canadian Governments that the Egyptian Government was held fully responsible for the loss of life and property and that the rights of His Majesty's Governments were fully reserved in this connection. Shortly thereafter, the Egyptian Government expressed their 'deepest sympathy and sincere condolences' to the Canadian Government. Subsequently, the British Government submitted a compensation claim to the Egyptian Government which included the sum of 100,000 Canadian dollars.³ This was made up as follows:

¹ See Ellery C. Stowell, 'The Imbrie Incident', *American Journal of International Law*, 18 (1924), p. 768.

² *A Modern Law of Nations*, p. 119.

³ Oppenheim-Lauterpacht, *International Law*, vol. 1 (8th ed., 1955) observe (p. 366): 'The vicarious responsibility of States for acts of insurgents and rioters is the same as for acts of other private individuals. Therefore only in case a State by exercising due diligence could have prevented, or immediately crushed, an insurrection or riot, can it be made responsible for acts of insurgents and rioters.'

Compensation for widow, Mrs. Boyer	\$62,527
Mr. Butterworth's losses (property)	\$3,151
Canadian Government claim	\$34,322

As a result of representations that were made by the Canadian Government through the British ambassador in Cairo as well as in direct communication between the Canadian Secretary of State for External Affairs and the Egyptian Minister of Foreign Affairs, the Egyptian Government agreed to make certain payments, which did not include an amount in respect of the Canadian Government's own claim. On 1 March 1954 the Egyptian Government made these payments, including an amount equivalent to 1,400 dollars for Mr. Butterworth's losses, in Canadian dollars. Subsequently, the Canadian Government turned over to Mrs. Boyer cheques in the total amount of 41,860.90 dollars.

ARRANGEMENTS FOR DISTRIBUTION OF COMPENSATION

In the event of the conclusion by Canada of a lump sum settlement of claims with another country the need exists for machinery, e.g. a domestic body, to adjudicate the claims and to distribute the settlement funds to entitled claimants. In Britain the Foreign Compensation Commission, and in the United States the Foreign Claims Settlement Commission are the domestic agencies performing these responsibilities. In Canada, however, no similar Commission exists and the matter has been dealt with on an *ad hoc* basis. The War Claims Commission, as its name implies, was given jurisdiction over war claims but not over other types of claims.

Where payments are made with respect to a specific claim, the problem does not arise since the funds can be turned over to the claimant by the Canadian Government either in full or after deducting an amount, as has been the practice of some governments, to cover at least part of the expense involved in the successful prosecution of the claim. If the respondent government makes its cheque payable to the Canadian Government and the exchange of Notes clearly specifies that the moneys paid to the Canadian Government by the foreign government are to be paid over to certain persons specified therein, it is believed that the payment could be regarded as being made for a specific purpose and thus turned over at once to the claimant.¹ However, if the claimant is not identified, it would probably

¹ Such an exchange could, no doubt, be considered a 'treaty' within the meaning of paragraph (k) of Section 2 of the Financial Administration Act (R.S.C. 1952), c. 116. Cf. Protocol between Canada, the United Kingdom and the Union of Soviet Socialist Republics (the Armistice Agreement between the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland on the one hand and Finland on the other, dated 19 September 1944), *Canada Treaty Series* (1944), No. 29. The Protocol referred to the return by Finland to the Soviet Union of former Soviet territory of the Oblast of Petsama and the consequent transfer to ownership of the Soviet Union of nickel mines operated in the said territory for the benefit of

be necessary to obtain a parliamentary vote to authorize the withdrawal of the claims funds from the Consolidated Revenue Fund of Canada. In the claims against Bulgaria for the deaths of the four Canadians in the shooting down of the Israeli airliner¹ there was a variation in the usual procedure, inasmuch as the Bulgarian Government made the cheques payable to the Canadian claimants. The cheques were delivered to a representative of the Canadian Embassy in Washington. In this way, the funds reached the hands of the claimants, who also were required to sign receipts in favour of the Bulgarian Government, with the least possible delay.

The lump sum settlement of Canadian claims against Bulgaria, effected on 30 June 1966, has underlined the need for some kind of Canadian agency to adjudicate nationalization and other types of claims and to arrange for equitable distribution to entitled claimants of any funds received. In view of the small number of apparently valid Canadian claims against Bulgaria brought to the Department of External Affairs' attention and the amount received (\$40,000), which represented a satisfactory percentage of the total amount of the claims advanced, there would hardly be justification for the creation of a full-fledged commission or body for the sole purpose of adjudicating these claims. Nevertheless, as that first direct settlement of nationalization claims is followed by settlements of the larger amounts of outstanding claims against other countries, it will no doubt be essential to establish some type of semi-permanent commission for this purpose. In the meantime, the distribution to claimants out of the Bulgarian settlement should not be held up pending the creation of a more permanent and quasi-judicial commission.

Accordingly, the procedure adopted to distribute the Bulgarian funds imposes on the Secretary of State for External Affairs and the Minister of Finance the formal responsibility for making computations of payments to entitled claimants.² They are to be assisted by an 'Adviser on Claims' the Mond Nickel Company and the International Nickel Company of Canada. The Soviet Government agreed to pay twenty million U.S. dollars as 'full and final compensation of the abovementioned companies'. Payment of this compensation by Canada to the International Nickel Company representing itself and the Mond Nickel Company, of all sums received by the Canadian Government from the Soviet Government was authorized by Orders-in-Council.

¹ Above, pp. 385 et seq.

² Foreign Claims (Bulgaria) Settlement Regulations established by P.C. 1966-2062 of 3 November 1966, S.O.R./66-506. The Regulations provide:

'1. These Regulations may be cited as the *Foreign Claims (Bulgaria) Settlement Regulations*.

2. In these Regulations,

(a) "Agreement" means the Agreement between the Government of Canada and the Government of the People's Republic of Bulgaria relating to the settlement of financial matters signed at Ottawa on June 30, 1966;

(b) "Claim" means a claim of the Government of Canada, a Canadian citizen or a Canadian juridical person against the Bulgarian Government in respect of property, rights, interests and debts in Bulgaria which have been affected directly or indirectly by Bulgarian measures of nationalization, expropriation or other similar measures which have taken effect before June 30, 1966;

[Note 2 continued overleaf

who is authorized *inter alia* to make non-binding recommendations as to the amounts of the payments.¹

FULL-FLEDGED CLAIMS COMMISSION

If a full-fledged commission were established in Canada, the procedures and experience of the British Foreign Compensation Commission and the United States Foreign Claims Settlement Commission would, of course,

(c) "Foreign Claims Fund" means the special account in the Consolidated Revenue Fund known as the Foreign Claims Fund established by Vote 22a of Appropriation Act No. 7, 1966; and

(d) "Ministers" means the Secretary of State for External Affairs and the Minister of Finance.

3. Payment to the Canadian Government by the Government of the People's Republic of Bulgaria of the sum of \$40,000 in accordance with Articles I and II of the Agreement constitutes satisfaction by Bulgaria of its obligation to Canada and Canadian claimants in respect of any claim subject to the Agreement.

4. (1) The Ministers may make payments out of the Foreign Claims Fund to any Canadian claimant who

(a) gave notice of his claim to the Government of Canada prior to June 30, 1966; and

(b) establishes to the satisfaction of the Ministers that he is entitled to receive compensation under Articles I and III of the Agreement in respect of a claim.

(2) Where a Canadian claimant has died on or after the 30th day of June, 1966, the Ministers may pay to the personal representative of the Canadian claimant or to such other person as appears to the Ministers to be entitled to the assets of the Canadian claimant any amount that they would have paid under subsection (1) to the Canadian claimant if he had survived.

5. (1) The payment to any person of an amount that the Ministers designate as a final payment in respect of the claim of a Canadian claimant under Articles I and III of the Agreement constitutes full satisfaction of all claims in respect of the Canadian claimant under those Articles.

(2) Before the Ministers make a final payment, they shall secure from the person to whom the payment is to be made in consideration of the payment, a release in the form that they consider satisfactory in respect of the claim for which payment is to be made.

6. (1) In administering these Regulations, the Ministers may refer any matter to an adviser to be appointed with the approval of the Treasury Board called the "Adviser on Claims under the Agreement" but the Ministers are not bound by the findings and recommendations of the adviser.

(2) The adviser shall, if so requested by the Ministers, enquire into and make reports and recommendations to the Ministers concerning

(a) the validity of claims by Canadian claimants under the Agreement;

(b) the amount to which a Canadian claimant is entitled under Articles I and II of the Agreement in respect of a claim;

(c) the division as between the Canadian claimants of the moneys to be paid out by the Ministers; and

(d) any other matter arising out of the administration of these Regulations.

(3) The Treasury Board shall determine

(a) the remuneration to be paid to the adviser; and

(b) whether the adviser's remuneration and expenses shall be

(i) paid out of the Foreign Claims Fund,

(ii) paid out of moneys provided by Parliament, or

(iii) apportioned in such manner as the Treasury Board may direct between the Foreign Claims Fund and the moneys provided by Parliament.'

¹ Settlement of Claims (Bulgaria) Regulations. These Regulations are similar to the Peace Treaty Claims (Japan) Settlement Regulations made by Order-in-Council P.C. 1961-1080, 22 December 1961, S.O.R. 62/9, 10 January 1962 under the Treaty of Peace (Japan) Act 1952, Statutes of Canada 1952, Chap. 50, Sec. 3. The latter Regulations were used to distribute the lump sum of 17,500 U.S. dollars received from Japan in settlement of Canadian claims under Article 18 (a) of the Treaty of Peace with Japan. See also the War Claims (Italy) Settlement Regulations P.C. 1954-1723, 18 November 1954, S.O.R. Consolidation (1955) vol. 3, p. 2856.

be helpful in resolving some of the questions that may arise in connection with the creation of such a commission. In fact existing legislation, namely the Inquiries Act,¹ could be used to establish a Canadian Foreign Claims Commission, as was done in the case of the War Claims Commission. The procedure followed in establishing the latter Commission was as follows. By Vote 696 of the Appropriation Act, No. 4, 1952,² the Custodian of Enemy Property was authorized to transfer German and Japanese enemy assets to the Minister of Finance, to be deposited in a special account to be established in the Consolidated Revenue Fund, which was to be known as the War Claims Fund. The Vote also authorized the Minister of Finance to make payments out of the War Claims Fund to Canadian war-damage claimants in accordance with regulations of the Governor in Council. Order-in-Council P.C. 4267 of 9 October 1952 was then made, bringing into effect the War Claims Regulations annexed to the Order. Order-in-Council P.C. 4354 of 23 October 1952 authorized, pursuant to the Inquiries Act, the appointment of Chief Justice Campbell of Prince Edward Island, Chief War Claims Commissioner, to perform certain functions, including inquiring into and reporting on Canadian war-damage claims for which compensation 'may' be paid from the War Claims Fund. The Chief Commissioner was required to state in respect of each claim whether the claimant was eligible under the Regulations to receive payment out of the War Claims Fund. The latter Order-in-Council also contained provision for the appointment of additional commissioners, pursuant to the Inquiries Act, as might be required.

It would seem that the Inquiries Act could equally be utilized to set up a Canadian Foreign Claims Commission. However, a vote of the Parliament of Canada would be required to transfer funds received from foreign countries in settlement of Canadian claims and which had been deposited in the Consolidated Revenue Fund. Such a vote was passed recently.³ The

¹ R.S.C. 1952, Chap. 154.

² Statutes of Canada, 1952, Chap. 55.

³ Department of Finance Vote 22a, Supplementary Estimates (A) 1966-7 which provides:

'Vote 22a. To authorize the Minister of Finance to establish a special account in the Consolidated Revenue Fund to be known as the "Foreign Claims Fund" to which shall be credited,

(a) notwithstanding Vote 696 of Appropriation Act No. 4, 1952, such part of the money received by him from the Custodian of Enemy Property under paragraph (a) of that Vote, the proceeds of sale of property under paragraph (b) of that Vote and the earnings of property specified in paragraph (b) thereof, as the Governor in Council directs, and

(b) all amounts received from governments of other countries pursuant to agreements entered into after April 1, 1966 relating to the settlement of Canadian claims,

and, notwithstanding section 35 of the Financial Administration Act, to provide for payments out of the Foreign Claims Fund in the current and subsequent fiscal years in accordance with regulations of the Governor in Council which regulations may, *inter alia*, provide for the determination of the nature of claims for compensation that may be made, the persons to whom compensation may be paid, and the manner and time for the submission of claims, the calculation (including any weighted or pro rata distribution) of the amount of the payments by the Minister of Finance and the Secretary of State for External Affairs, and to authorize payment of the expenses incurred in investigating and reporting on such claims.'

Inquiries Act could also be used for setting up smaller and perhaps one-commissioner agencies from time to time to dispose of claims in respect of more modest amounts received in settlement of Canadian claims.

On the grounds of saving expense and expediting payments to claimants, it may be asked why the Department of External Affairs, in consultation with other departments concerned, could not prepare recommendations for payment of claims. Such an arrangement might engender criticism from claimants and others, since the traditional characteristics associated with a quasi-judicial body, such as a domestic claims commission, would be absent. In any case, a parliamentary vote would be required to authorize payments out of the Consolidated Revenue Fund of settlement moneys deposited therein.

THE TIME FACTOR

It is surprising how many international claims are settled eventually if the sponsoring State continues to manifest an interest in settlement. Perhaps in some cases this may be merely a matter of wearing down opposition to the claims. Something of this nature has been suggested by Sir Cecil J. B. Hurst:

'The very antiquity of a claim tends sometimes to give it a semblance of validity which is wholly undeserved. When criticism of the most destructive character at the hands of the respondent government fails to secure the abandonment of a claim, and at intervals it is again put forward through the diplomatic channel, a feeling tends to arise that after all the claim may possess some merits. When at length the very importance with which the claim has been urged secures for it submission to some arbitration tribunal, the respondent government has to meet the prejudice which can be raised by dilating on the difficulty in securing an impartial hearing for the claim.'¹

Canadian experience supports the proposition that a good percentage of claims will eventually be settled, although progress toward settlement of some claims has followed a lengthy and slow pattern similar to that encountered by other countries in arranging settlements.² Nevertheless, a serious defect in the present system continues to be the length of time often required to obtain settlement. Further delay is involved even after compensation has been received by way of a lump sum settlement, since usually a domestic commission or agency will have to be established to make an equitable distribution to entitled claimants. Where a large number of claims are involved, this process could take several years, although some relief might be obtained by claimants through interim payments, leaving the final accounting until all the claims have been adjudicated.

¹ 'Wanted! An International Court of Piepowder', this *Year Book*, 6 (1925), p. 61, at p. 62.

² However, some other countries having economic and other inducements to offer have effected settlements of nationalization claims with a number of Eastern European countries. A list of these settlements is contained in Castel, *op. cit.* above, p. 360, n. 1, at p. 991.

An extreme illustration of delay is the *Cayuga Indians* claim¹ which, in the words of the American and British Claims Tribunal, was a claim 'against the United States by virtue of certain treaties between the State of New York and the Cayuga Nation in 1789, 1790 and 1795, and the Treaty of 1814 between the United States and Great Britain known as the Treaty of Ghent'. The Canadian Cayugas, who migrated from New York to Canada, were in effect deprived from about 1811 of their share of certain annual money payments which New York State continued to make to those members of the tribe who remained in the United States. However, the Tribunal held that liability did not accrue until New York definitely refused to recognize the claims of the Canadian Cayugas and the matter was brought to the attention of the authorities of the United States, who did nothing to carry out the treaty provision. Accordingly, in the opinion of the Tribunal, the earliest date at which the claim can be said to have accrued, as a claim against the United States under international law, was 1860. The claim was finally settled in 1926 by the Tribunal's award of 100,000 dollars to the Canadian Cayugas.²

Sir Cecil Hurst, writing in the *British Year Book of International Law* in 1925,³ provided a valuable analysis of the time element involved in individual claims adjudicated by well-known arbitral tribunals. Referring to the British American Claims Tribunal under the Convention of 1910, Sir Cecil pointed out:

'The latter commission has up till now decided thirty-four claims. Of these only three were less than ten years old by the time the Tribunal gave its decision, the age of the claim being reckoned for this purpose from the occurrence out of which it arose. . . . Of the remaining thirty-one claims, the age of twelve claims was between eleven years and twenty; of eleven claims between twenty years and thirty, of three between thirty and forty, of four between forty and fifty, and one was over a hundred, having arisen in 1812 and been decided in 1914.

'It is much the same with the claims which are still awaiting decisions. One claim arose in 1812; another in 1845 . . . it is difficult to find a single claim still awaiting adjudication which is not earlier in origin than the present century.'

How does Canadian experience since the date of this article compare with that described by Hurst? While the time involved in obtaining compensation has in general been much less, there has been some hardship. The Canadian claimants in the *I'm Alone* arbitration, at least some of whom were hard-pressed financially, waited almost six years, through the heart

¹ 'The Cayuga Indians, American and British Claims Arbitration under the Agreement of 18 August, 1910', Nielsen's *Report* (1926), p. 310.

² The Tribunal's recommendation included as one element of the award 'an amount equal to a just share in the payments of the annuity from 1849' when 'the facts of the case had been brought to the notice of the [New York] legislature and a public commission had recommended that justice be done'; *ibid.*, pp. 330-1.

³ Cited above, p. 396, n. 1.

of the depression, to receive compensation for their losses when the *I'm Alone*, a rum-runner, was sunk illegally in 1929 by a United States coast-guard cutter. The families of the Canadian victims of the Israeli aircraft disaster waited just over seven years to receive compensation from the Bulgarian Government. In the meantime, before compensation had been received, the widow of Mr. Max S. Altman had died. Claims arising out of the Sino-Japanese 'incident' of 1937-41 were settled in 1961. Many Canadians having claims arising out of the Second World War had no remedy until the War Claims Commission, which was established in 1952, began to recommend awards. While Canadian claimants against Yugoslavia for nationalization of property were beneficiaries under the 1948 British Agreement with Yugoslavia, compensation from Bulgaria was received in 1966. At the present time (March 1967) post-Second World War claimants against Poland, Czechoslovakia, Hungary, Roumania and the Soviet Union have no definite indication as to when compensation may be available. On the other hand, United States claimants who allegedly suffered water damage to their properties in 1951-2 as a result of the construction by Canada of Gut Dam in the St. Lawrence River, will have their claims heard by the Lake Ontario Claims Tribunal, which has been established under the Agreement between Canada and the United States signed on 25 March 1965, and which came into force on 11 October 1966.¹ Under the Agreement the Tribunal is bound to complete its work within two years of its first meeting, unless this period is extended by the two Governments. However, the Tribunal could be confronted with determining difficult questions as to liability for the damage in respect of the 230 claims filed with the Joint Secretaries of the Tribunal prior to the deadline of midnight, 9 January 1967, in accordance with the terms of the Agreement. The filing of further pleadings and briefs will take some time to complete and the date for actual hearing of the claims is to be determined. Awards of the Tribunal must be paid in United States dollars within one year.²

THE FUTURE

It has long been apparent that existing procedures for the protection of aliens and their property interests abroad are inadequate.³ When claims do

¹ Department of External Affairs Press Release No. 55 of 11 October, 1966.

² Article XIII.

³ F. V. Garcia-Amador has pointed out: 'After World War II, the need to promote economic and social development in some areas created a new motivation for the study of a very important chapter of the law of international responsibility, i.e. the principles and procedures relating to the treatment of foreign private investments. Perhaps the first step in this direction was taken by the Economic and Employment Commission of the Economic and Social Council (E.C.O.S.O.C.) of the United Nations. This Commission instructed the Sub-Committee on Economic Development. . . to commence a study, in cooperation with the other commissions of the United Nations

arise there are serious imperfections in the system for obtaining satisfaction of compensation. Often a remedy only becomes available after long years of waiting and then the procedures are much too costly, slow and complex. If it were not for the governmental interest in the settlement of claims, as generally leading to improved relations, the amount of the settlement would in many cases be disproportionate to the expense incurred by the espousing State. The present system requires great patience on the part of the individual claimant, who usually has very little inkling as to how matters are proceeding and the possibility of a settlement. At present it would seem that the international community has not reached the point where suggestions for fundamental improvements have much hope of receiving general acceptance. On the other hand there is something to be said to the credit of the present system. The individual claimant sometimes benefits from the pressure that can directly or indirectly be exerted towards a favourable settlement by other aspects of his country's foreign relations with the respondent State. It would be difficult to assess the assistance lent to a settlement when outstanding claims are mentioned during general discussions by the leaders of the espousing and respondent States.

The scope of this article does not permit discussion of the suggestions that have been made for improvement of the systems, such as recognition of the full international personality of the individual claimant, including a right of direct access to international tribunals established to afford redress for his injuries.¹ It seems to the writer, however, that some of the suggestions should be carefully weighed against actual experience and the

and the specialized agencies concerned, with a view to making recommendations regarding the need for an international code relating to foreign investment which will cover among other things, the protection of economic and social interests of the countries in which investments are to be made, as well as the protection of both public and private investors ...'. 'The Role of State Responsibility in the Private Financing of Economic and Social Development', *Syracuse Law Review*, 16 (1965), p. 738, at pp. 739-40.

¹ See, e.g., Lauterpacht, *International Law and Human Rights* (1950), Chapter 3: International Procedural Capacity of Individuals; Jessup, *A Modern Law of Nations*, especially pp. 114-20; Fatouros, *Government Guarantees to Foreign Investors* (1962); 'An International Code to Protect Private Investment—Proposals and Perspectives', *University of Toronto Law Journal*, 14 (1961), p. 77; Lee, 'Proposal for the Alleviation of the Effects of Foreign Expropriatory Decrees on International Investments', *Canadian Bar Review*, 36 (1958), p. 350, especially at pp. 357-9; F. V. Garcia-Amador, 'State Responsibility in the Light of the New Trends of International Law', *American Journal of International Law*, 49 (1955), p. 339; L. B. Sohn and R. R. Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens', *ibid.* 55 (1961), p. 545, containing draft Convention; E. D. Re, 'The Foreign Claims Settlement Commission', *Michigan Law Review*, 60 (1962), p. 1079, at p. 1100. Professor Bishop has suggested: 'Secondly, if there is a real disposition to use international legal processes, nations like our own might well consider the establishment of permanent local international tribunals to deal with the thousands of international claims for injuries to individuals at the hands of foreign governments, now gathering dust in the files of foreign offices until the day when arbitral tribunals are set up. Individuals might well be given direct access to such tribunals in their own name with as inexpensive a procedure as practicable. Possibly chambers of the International Court of Justice, meeting in various parts of the world, could be used for this purpose'; 'The International Rule of Law', *ibid.* 59 (1961), p. 553, at p. 573.

practical realities of international claims. Unfortunately the complete record of much of this experience, particularly that of the last quarter-century, lies buried in the files and archives of foreign ministries. Certainly, there is much room for improvement, but the question must be asked whether the international community of States has reached the stage of development where it is prepared not only to create the necessary machinery in order that an immediate and effective remedy will be available to individual claimants in their own right, but also to abide by any adverse decisions, and that even when these may be considered as possibly reflections on national honour and dignity.¹

¹ For a description of recent attempts of the United Nations International Law Commission, the Harvard Law School and the American Law Institute to 'reformulate' the principles of State responsibility see R. B. Lillich, 'Toward the Formulation of an Acceptable Body of Law Concerning State Responsibility', *Syracuse Law Review*, 16 (1965), p. 721, also cited above, p. 376, n. 3.

NOTES

THE INDEPENDENCE OF MALTA AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

By MARC-ANDRÉ EISSEN¹

ON 12 December 1966 Mr. George Borg Olivier, Minister for Commonwealth and Foreign Affairs of Malta, signed the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, often referred to as the European Convention on Human Rights—together with four of the five subsequent Protocols (Nos. 1, 2, 3 and 5).² Various reservations and declarations were made on that occasion.³ The deposit of Malta's instrument of ratification took place shortly afterwards, on 23 January 1967. Thus it appears that the Maltese Government considered that Malta could not be bound by the Convention, except in the way specifically provided for in Article 66, according to which the Convention 'shall be open to the signature of the Members of the Council of Europe' and 'shall be ratified'.

In the Consultative Assembly, however, a different view on this subject had been put forward by at least one delegate, Mr. Buttigieg, a member of the Maltese Parliament and of the Malta Labour Party. On 3 May 1966, i.e. several months before Malta's signature, Mr. Buttigieg, with nine others from various national delegations,⁴ tabled a motion for a recommendation 'on the right to freedom of expression' (Doc. 2071). This motion, which the Consultative Assembly referred to its Legal Committee, read as follows:

'The Assembly,

'1. Considering Article 10 of the European Convention on Human Rights which guarantees the right to freedom of expression and Article 14 thereof which provides that the rights and freedoms set forth in the Convention shall be enjoyed without discrimination;

'2. Considering Article 3 of the First Protocol to the Convention by which the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature;

'3. Considering that there are reasons to believe, that these principles were not sufficiently respected during the recent elections in Malta;

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¹ Deputy Registrar of the European Court of Human Rights. The opinions expressed in this article are those of the author and do not represent any official view.

² The previous issues of this *Year Book* contain several articles about the Convention: by Sir Humphrey Waldo (1958), pp. 356 et seq.; by Golsong (1957), pp. 317 et seq. and (1962), pp. 445 et seq.; and by Robertson (1950), pp. 145 et seq., (1951), pp. 359 et seq., (1960), pp. 343 et seq., and (1961), pp. 536 et seq.

³ See Appendix, below, pp. 409–10.

⁴ MM. Moe (Norway), Hambling (United Kingdom), Lord Listowel (United Kingdom), MM. Goedhart (Netherlands), Vos (Netherlands), Czernetz (Austria), Schmid (Federal Republic of Germany), Lannung (Denmark, Chairman of the Legal Committee) and Bohy (Belgium).

'4. RECOMMENDS to the Committee of Ministers that it should invite all Member States to observe scrupulously the principles of freedom of expression without discrimination at all times and particularly on the occasion of national elections.'

Although paragraph 3 of this text relied merely on the *principles* enshrined in three Articles of the Convention and Protocol, it results from the relevant report of the Legal Committee that:

'Mr. Buttigieg circulated to all members of the Committee documents which seemed to indicate at first that Malta might have *succeeded on independence to the international obligations of the United Kingdom*¹ which, of course, included the European Convention on Human Rights'.²

On the other hand, the same report shows that the Legal Committee did not share Mr. Buttigieg's opinion on the point. This is clear not only from paragraphs 6 and 7 of the explanatory memorandum, but also from the terms of a draft Resolution whereby the Consultative Assembly,

'Aware that allegations (had) been made that certain rights guaranteed by the Convention (had) been infringed in the 1966 Malta General Election;

'... ;

'Considering (...) that the proper forum for the investigation of such allegations would be the bodies responsible for ensuring the observance of the Convention³ and not the Assembly itself;

'Conscious that Malta (had) neither signed nor ratified the Convention and (did) not recognize the right of individual petition⁴ or the compulsory jurisdiction of the European Court of Human Rights',⁵

was invited to

'[to call] upon Malta and other member States which have not yet signed⁶ or ratified⁷ the (Convention) or recognised the right of individual petition and the compulsory jurisdiction of the (Court), to do so as soon as may be practicable'.⁸

The draft Resolution, adopted by the Legal Committee on 26 September 1966 by 21 votes to 1, was due to be discussed by the Assembly on 26 January 1967.⁹ In the meanwhile, however, Malta's signature and ratification had created a new situation, which obviously called for a revision of the draft.¹⁰ Furthermore, the Maltese delegation had to leave Strasbourg on 25 January in order to take part in an important debate in the Malta Parliament. This led the Consultative Assembly to postpone its consideration of the report until a further session.

¹ Author's italics.

² Report 'on the signature and ratification' of the Convention, Doc. 2131 of 26 September 1966, paragraph 6 of the explanatory memorandum submitted by Mr. Richard (United Kingdom) on behalf of the Committee.

³ European Commission and Court of Human Rights; Committee of Ministers of the Council of Europe.

⁴ Article 25 of the Convention.

⁵ Article 46 of the Convention.

⁶ Switzerland.

⁷ France.

⁸ Cyprus, Greece, Italy and Turkey.

⁹ On 29 September 1966, MM. Cassar-Galea and Borg Olivier de Puget (Malta, Nationalist Party) tabled an amendment which aimed, *inter alia*, at: (i) pointing out that no recourse had 'been made to the Constitutional Court of Malta by the Malta Labour Party or by any other body or individual'; (ii) deleting the words 'Malta and other' in the operative part of the draft resolution.

¹⁰ The deposit of Malta's instrument of ratification coincided with the opening day of the January Session of the Assembly.

The purpose of the present study is to examine briefly the question of State succession which arose in the circumstances mentioned above. While the question has ceased to be of practical interest in the particular case,¹ the point of law remains open.

The Human Rights Convention does not contain any express provisions on the matter. Nor does the case-law of the European Commission and Court of Human Rights afford any relevant precedents. The Commission dealt in 1957 with four 'individual' applications (Article 25 of the Convention) lodged against the Federal Republic of Germany but relating to acts which had occurred on the territory of the Saar before it was incorporated into that of the Federal Republic, i.e. before 1 January 1957. It noted that these applications raised the problem whether or not 'the Federal Republic of Germany had succeeded to the obligations undertaken by the Saar under the Convention and Protocol'.² The Commission did not, however, find it necessary to resolve the problem since the applications were in any event inadmissible for various reasons.³

In the case of the Saar, the situation was clearly different from that which arose in regard to Malta in two respects. First, the question was not, as in the case of Malta, whether a *new* State had succeeded to the obligations of its predecessor but whether the obligations of a particular State⁴ had lapsed or had been transmitted to an *existing* State when the former became a part of the latter. In other words, it was a question of the effect of an *enlargement of the territory*—not of *independence*—on treaties. Secondly, the European Commission of Human Rights had not to examine—as the Legal Committee of the Consultative Assembly did in respect of Malta—whether or not a State B had succeeded to the *primary* treaty obligations of a State A. The only point it was faced with was whether or not State B (the Federal Republic of Germany) had succeeded to the *secondary* obligations resulting from alleged breaches by State A of its primary treaty obligations,⁵ i.e. whether or not B could be held *responsible* for such violations as might have been committed by A and was legally bound to make them good.⁶

¹ Except perhaps for the period which elapsed between Malta's accession to independence, or her joining the Council of Europe, and the deposit of her instrument of ratification of the Convention, these dates being 21 September 1964, 29 April 1965 and 23 January 1967 respectively.

² The Saar had ratified the Convention and Protocol on 14 January 1953 (entry into force: 3 September 1953 and 18 May 1954 respectively), but had not accepted the right of 'individual' application under Article 25 of the Convention.

³ Decisions of 20 July and 20 December 1957 on Applications Nos. 245/57 and 256/57, 1 *Yearbook of the European Convention on Human Rights* (cited throughout this article as *Yearbook of the E.C. on Human Rights*), pp. 183–7, and 188–9; unpublished decisions of 20 July and 29 August on Applications Nos. 255/57 and 286/57. On these decisions see Wiebringhaus, *Die Rom-Konvention für Menschenrechte in der Praxis der Strassburger Menschenrechtskommission* (1959), pp. 141–2.

The same question could have been examined also in respect of Applications Nos. 252/57, 282/57, 523/59 and 1794/63, but the Commission did not even mention it in its relevant decisions of 20 July 1957 (unpublished), 16 December 1957 (1 *Yearbook of the E.C. on Human Rights*, pp. 164–6), 5 January 1960 (unpublished) and 23 May 1966 (*Collection of Decisions of the European Commission of Human Rights*, No. 20, pp. 8–27).

⁴ Without prejudice to whether or not the Saar was to be considered a 'State' before 1 January 1957. The Saar had been admitted into the Council of Europe in 1950 as an Associate Member under Article 5 of the Statute—not as a full Member within the meaning of Article 4. The same applied to the Federal Republic of Germany until 1951. Article 5 refers to European *countries*, while Article 4 deals with European *States*.

⁵ This was perhaps not sufficiently stressed in the decisions listed above, n. 3, except in the decision of 20 July 1957 on the admissibility of Application No. 256/57.

⁶ The question of succession to international responsibility (which does not appear to have

[Note 6 continued overleaf

Leaving aside the question of international responsibility, there can hardly be any doubt that the Federal Republic of Germany's 'primary' obligations under the Human Rights Convention were automatically extended, as from 1 January 1957, to the Saar territory. Nevertheless, this happened not by way of State succession but because the persons living in that territory became, on 1 January 1957, for the purposes of Article 1 of the Convention and subject to certain temporary limitations,¹ persons 'within the jurisdiction' of the Federal Republic of Germany which had ratified the Convention on 5 December 1952.² This view, which seems to be in keeping with general international law,³ was apparently that both of the Federal Government itself⁴ and of the European Commission of Human Rights.⁵

The case of the Saar does not therefore throw any light on the problem of a possible succession by Malta to the United Kingdom's obligations under the Human Rights Convention.

Two facts have been invoked to support a positive answer to the problem. First, by a declaration made on 23 October 1953 in pursuance of Article 63 of the Convention, the United Kingdom extended the applicability of the Convention to more than forty territories, including Malta, for whose international relations it was responsible at the time.⁶ Secondly, under the terms of an agreement concluded between the United Kingdom and the Maltese Government on 31 December 1964 by means of an exchange of letters:

'(i) all obligations and responsibilities of the Government of the United Kingdom which arise from valid international instruments shall, as from the 21st September 1964,

been raised in any way with regard to Malta) is generally answered in the negative. See for instance Monnier, 'La succession d'états en matière de responsabilité internationale', *Annuaire français de droit international* (1962), pp. 65-90.

¹ See Golson, 'Zur Frage der Passivlegitimation vor der Europäischen Menschenrechtskommission', *Neue Juristische Wochenschrift* (1958), pp. 732-3, paras. 4 and 5, and *Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention* (1958), pp. 62-3.

² Entry into force: 3 September 1953.

³ See Lord McNair, *The Law of Treaties* (1961), pp. 633-8; O'Connell, *International Law* (1965), pp. 435-6.

The question of State succession *as such* could have arisen—but did not—in respect of Protocol No. 1 to the Human Rights Convention, which was binding on the Saar since 18 May 1954 and was not ratified by the Federal Republic of Germany until 13 February 1957: was the Federal Republic of Germany under an international obligation to apply the Protocol *in the Saar territory* (at least) as from 1 January 1957?

⁴ Observations of the Federal Government on Application No. 245/57, 1 *Yearbook of the E.C. on Human Rights*, p. 186.

⁵ Unpublished decision of 20 July 1957 on the admissibility of Application No. 255/57: '... le rattachement politique de la Sarre à la République Fédérale d'Allemagne, survenu le 1^{er} janvier 1957, a entraîné l'extension à la Sarre du droit de recours individuel, que la République Fédérale d'Allemagne avait accepté dès le 5 juillet 1955.' The extension of the right of 'individual' application necessarily presupposes that of the Convention itself since any such application must relate to an alleged violation by the High Contracting Party concerned 'of the rights set forth in (the) Convention'. See also 1 *Yearbook of the E.C. on Human Rights*, pp. 55 (n. 6), and 104, and the 'Conclusions' of the 7th plenary session of the Commission, Doc. DH (57) 2, paras. II and IX, pp. 2 and 4.

⁶ 1 *Yearbook of the E.C. on Human Rights*, pp. 46-7. Subsequent declarations made on 9 June 1964 (*ibid.*, vol. 7, pp. 32-4), 12 August 1964 (*ibid.*, pp. 36-8), 5 August 1966, 12 January 1967 and 12 September 1967 brought the initial list up to date by adding to it a few territories which were not originally covered and by omitting those (more than twenty) which had become independent in the meanwhile. The declaration of 5 August 1966 stated that Her Majesty's Government's responsibilities under the Human Rights Convention had lapsed in respect of Malta, among other territories, on 21 September 1964.

be assumed by the Government of Malta in so far as such instruments may be held to have application to Malta;

'(ii) the rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to Malta shall, as from the 21st September 1964, be enjoyed by the Government of Malta'.

The first of these facts calls for only one observation: the United Kingdom declaration of 23 October 1953 concerned exclusively the Convention itself and not Protocol No. 1, of which Article 3 was referred to in the motion for a recommendation quoted above. As to the second, the scope of the December 1964 agreement—which was not officially communicated to the Secretary-General of the Council of Europe¹—must not be overestimated. The Government of Malta undertook to accept, as from 21 September 1964, the obligations arising for the United Kingdom Government from valid international agreements only '*in so far as such instruments may be held to have application to Malta*'. But is not this the very question with which we are faced, whether or not the European Convention on Human Rights may be held to have continued to apply to Malta since 21 September 1964, the date of Malta's accession to independence?

A Special Committee of the International Law Association² is studying the effect of independence on treaties and, in a wider context, the succession of new States to the international obligations of their predecessors. In an *Interim Report* which was submitted to the plenary Conference at Helsinki (August 1966) the Committee pointed out that the contemporary practice of States, although 'marked by considerable inconsistency and contradiction . . . has developed generally in the direction of continuing treaties which before independence were territorially applied to the territories of States which have newly become independent'.³

Amongst the various methods aiming at ensuring such continuity, the *Report* mentioned the signing of a 'devolution or inheritance agreement'.⁴ Agreements of this kind have been concluded by about twenty States including the Federation of Nigeria,⁵ Cyprus⁶ and Malta.⁷ Nigeria and Cyprus appeared, together with Malta, on the list of territories attached to the United Kingdom declaration of 23 October 1953. However, neither the Nigerian nor the Cypriot authorities seem to have considered that the devolution agreements binding on them—almost identical to the agreement concluded between the United Kingdom and Malta on 31 December 1964—mean that *all* treaties which were made applicable to the then territories of Nigeria or Cyprus as a result of the signature or ratification or declaration of extension by the United Kingdom necessarily remain in force there since independence.⁸ Moreover, the Nigerian Government recently published a first list 'of the multilateral treaties and of the few bilateral treaties that have been recognized as clearly binding on Nigeria';⁹ and this list does not include

¹ The Secretary-General is the depositary of all conventions concluded within the Council of Europe. On the other hand, the agreement of 31 December 1964 seems to have been notified to the Secretary-General of the United Nations (Legal Committee of the Consultative Assembly of the Council of Europe, Doc. AS/Jur (18) 8, p. 2).

² This Committee (hereinafter referred to as the Special Committee of the I.L.A.) is composed of 15 members including Professor Rousseau (France) as Chairman, and Professor O'Connell (Australia) as Rapporteur.

³ *Interim Report*, p. 2, para. 1.

⁴ *Ibid.*, pp. 4-6, para. 3 (a).

⁵ Exchange of letters of 1 October 1960, Cmd. 1214.

⁶ Article 8 of the Treaty of 16 August 1960, Cmd. 1252.

⁷ Exchange of letters of 31 December 1964, quoted above.

⁸ *Interim Report*, p. 6: 'Devolution agreements do not necessarily eliminate uncertainty respecting particular treaties. The agreements are ambiguous and may . . . give rise to problems of interpretation. Their operation is thus unclear in law.'

⁹ *Ibid.*, pp. 13-14.

the European Convention on Human Rights,—for the obvious reason which is set forth below. As to the Republic of Cyprus, it became a Party to the Convention by its own act (as well as to Protocol No. 1), signing it on 16 December 1961 and ratifying it on 6 October 1962. The thought of the possible succession of Cyprus to the United Kingdom's obligations under the Convention and Protocol does not seem to have occurred to anyone, although the legal situation of Cyprus was in this respect similar to that of Malta.

On the other hand, the Prime Minister of Malta, according to Mr. Buttigieg, told the House of Representatives that the agreement of 31 December 1964 and its subsequent notification to the Secretary-General of the United Nations 'made Malta a party to *all*¹ treaties and conventions which the United Kingdom had signed on behalf of Malta as a colony'.² Clearly, a statement of this kind could not of itself bind the Contracting Parties to the European Convention on Human Rights. Article 66 of the Convention lays down the procedure which every State must normally follow in order to become a Contracting Party, namely signature and ratification. Admittedly, this does not exclude *ipso jure* the possibility of State succession, but it must be shown that such a possibility is not contrary to the intentions of the draftsmen of the Convention or to customary international law.

Customary international law lacks clarity and consistency in respect of State succession. Except for certain treaties, e.g. the 'dispositive treaties', it has generally been considered that the principle was rather non-succession of the new State to the international obligations of its predecessor.³ True, the recent evolution of practice seems to favour a greater 'continuity' and this trend should be welcome. Is it, however, already possible to speak of a reversal of international custom? So categorical a conclusion would probably be premature. In modern practice, which the Special Committee of the I.L.A. has analysed in detail, State succession operates seldom in an automatic and tacit way: it almost always results, or at least appears to follow, from explicit legal acts, be they international agreements or unilateral declarations.⁴ Furthermore, one may query the exact nature of these acts: are their purpose and effect simply to acknowledge an *existing* legal situation or to establish deliberately a partially *new* one? The Committee was careful to stress in its *Report* that it '[made] no statement as to the present state of international law on the subject'; it added that the tendency towards continuity was 'more evident in respect of some categories of treaties than in respect of others'.⁵ It also pointed out, with regard to 'devolution or inheritance agreements', that these

'may affect an assignment to the successor State of treaties which under customary international law might not be succeeded to. . . . Such an assignment is effective only with the consent of other parties. This may be tacit, and . . . protest is rare . . .'.⁶

In the circumstances, it seems safer to have regard primarily to the letter and spirit of the European Convention on Human Rights and to its special nature and structure. The Convention is one of the most 'regional' and 'closed' amongst all those international instruments which have been drafted and concluded in the framework of the

¹ Author's italics.

² Legal Committee of the Consultative Assembly, Doc. AS/Jur (18) 8, p. 2.

³ See for instance Guggenheim, *Traité de Droit International Public* (1953), vol. 1, pp. 463-5, and Lord McNair, *The Law of Treaties* (1961), pp. 600-6.

⁴ *Interim Report*, pp. 4-11. Very useful information on the matter is to be found in the 'handbook' on 'the effect of independence on treaties' which the International Law Association published in 1965.

⁵ *Interim Report*, pp. 1-2.

⁶ *Ibid.*, p. 5.

Council of Europe. It constitutes, in some measure, a complement to the Statute of the Council.¹ This is the reason why it is open only to Members of the Council, i.e. to European States or countries.² Moreover, the Convention confers various and important functions upon the Committee of Ministers, the Consultative Assembly and the Secretary-General of the Council of Europe.³

On 17 May 1962 the Consultative Assembly recommended 'that the Committee of Ministers should instruct the Committee of Experts which [was] already examining various questions relating to the European Convention on Human Rights to draft amendments to the Convention providing for the possibility of accession by non-member States which possess the necessary qualifications, on the invitation of the Committee of Ministers, after consultation of the Assembly'.⁴ In February 1963 the Committee of Ministers decided, however, not to give effect to this proposal.⁵

It follows from the *regional and closed character* of the Convention that immediately upon independence it ceases to apply to any *extra-European* territory like Nigeria, on behalf of which a Contracting Party had made a declaration of extension in pursuance of Article 63. As already mentioned, only *European* States or countries may adhere to the Council of Europe.

As a European island, Malta did not encounter this 'geographical' obstacle, and has in fact been a Member of the Council of Europe since 29 April 1965. Does this mean that she acquired on that date and by a process of 'State succession', the status of Party to the European Convention on Human Rights? Such a conclusion would seem scarcely conceivable. In fact, between the accession of Malta to independence (21 September 1964) and her joining the Council of Europe (29 April 1965) there was an interval of several months; during that intervening period Malta would not have been bound by the Convention, since she was not a Member of the Council of Europe. The 'succession' hypothetically resulting from the agreement of 31 December 1964 (or confirmed by that agreement) would then have been subject to a suspensory condition—membership of the Council of Europe—and would not have taken effect until that condition had been fulfilled. To accept that a legal position of this kind could have arisen would take us far into the realm of speculation.⁶

The difficulty would be avoided if Malta could be considered as having also become a Member of the Council of Europe by process of 'State succession' as early as 21 September 1964. But such a view would be untenable. The Statute of the Council of Europe confers on the Committee of Ministers, with regard to the admission of new Members, the power of ascertaining whether or not a European State or country is 'able and willing', *inter alia*, to 'accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms' (Articles 3 to 5). Recourse to the theory of State succession would deprive the Committee of Ministers of this power to some extent, while the Human Rights Convention itself states that nothing in it 'shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe' (Article 61). In any event, Malta's accession to the Council of Europe occurred in the way prescribed by

¹ See Articles 1 (b) and 3 of the Statute.

² Articles 65 (3) and 66 (1) of the Convention, taken in conjunction with Articles 4 and 5 of the Statute.

³ See Articles 15 (3), 21 (1), 22 (2), 24, 25 (1) and (3), 30, 31 (2) and (3), 32, 35, 37, 39 (1), 40 (2), 42, 46 (3), 54, 57, 58, 63 (1), 65 (1), 66 (1) and (4) of the Convention.

⁴ 5 *Yearbook of the E.C. on Human Rights*, pp. 42-4.

⁵ *Ibid.*, vol. 6, p. 74.

⁶ This point was made in the already cited report of Mr. Richard (Consultative Assembly, Doc. 2131 of 26 September 1966, para. 7, p. 6; and above, p. 402, n. 2).

the Statute, and this in accordance with an express request of the Maltese authorities. Neither the Committee of Ministers, nor the Consultative Assembly,¹ nor the Government of Valletta appear to have contemplated, at any material time, the possibility of an automatic accession by a process of State succession. Moreover, the same procedure of formal admission had been used in respect of the Republic of Cyprus a few years before.

Lastly, the adoption of the 'succession theory' would have led to rather strange consequences:

(a) The European Commission of Human Rights consists 'of a number of members equal to that of the High Contracting Parties' (Article 20 of the Convention). A Member of the Commission should therefore have been elected 'on behalf of' Malta long before Malta ratified the Convention. This election, however, was not carried out until 21 April 1967.²

(b) The request for information which the Secretary-General of the Council of Europe sent on 9 October 1964 in pursuance of Article 57 of the Convention³ should have been addressed also to the Government of Malta, at least after 29 April 1965; but it was not.

(c) Before Malta's accession to independence, the Convention applied to the island only 'with due regard to local requirements' (Article 63 (3) of the Convention). Under the State succession view this limitation would presumably have still held good with regard to Malta, which would thus have had smaller obligations than her partners.

(d) *Per contra*, Malta would have been in a less favourable position than other member States in the following regard. Under the terms of Article 64 of the Convention, 'any State may, when signing (the) Convention or when depositing its instrument of ratification, make a *reservation* in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision'.⁴ If Malta had succeeded to the United Kingdom's obligations, her signing and ratifying the Convention would have been pointless. Consequently, she would have been deprived of the opportunity of availing herself of Article 64, except perhaps with the consent of Contracting Parties. The validity of the reservations which Malta did in fact formulate on 12 December 1966 could therefore be disputed, which again would bring us into deep waters.

For all the above reasons, it seems quite clear that Malta did not succeed on

¹ According to a resolution 'of a statutory character' adopted in May 1951 by the Committee of Ministers, the Committee must obtain the opinion of the Consultative Assembly before inviting a European State or country to join the Council of Europe. The Assembly was indeed consulted: in its Opinion No. 44 of 25 January 1965, it declared itself in favour of the Committee of Ministers' inviting Malta to become a Member of the Council of Europe. It is interesting to note that in the same Opinion the Assembly expressed 'the wish that after its accession Malta sign and ratify the European Convention on Human Rights as soon as possible', a wish which would have been pointless had the Assembly adopted the 'State succession' view of the matter.

² On the other hand, Mr. John Cremona, Vice-President of H.M. Constitutional Court and H.M. Court of Appeal, was elected a Judge of the European Court of Human Rights 'on behalf' of Malta as early as 27 September 1965, because the Court consists 'of a number of judges equal to that of the Members of the Council of Europe' (Article 38 of the Convention).

³ According to Article 57, 'on receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention'.

⁴ The United Kingdom made no reservation except about Article 2 of Protocol No. 1 (see below, p. 410, n. 2). This instrument, however, was not extended to Malta prior to independence.

21 September 1964 (or alternatively on 29 April 1965) to the United Kingdom's obligations under the Human Rights Convention and that she did not become a Party to this Convention until the deposit of her instrument of ratification on 23 January 1967. This view is based essentially on the particular nature and structure of the Convention, and above all upon its highly regional and closed character. The problem of State succession might call for a different answer in the case of other European Conventions which are more 'open'.¹

APPENDIX

DECLARATION AND RESERVATIONS
MADE BY THE GOVERNMENT OF MALTA WHEN
SIGNING THE CONVENTION AND PROTOCOL
(12 DECEMBER 1966)

1. *Declaration of interpretation*

The Government of Malta declares that it interprets paragraph 2 of Article 6 of the Convention² in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts.

2. The Government of Malta, having regard to Article 64 of the Convention, and desiring to avoid any uncertainty as regards the application of Article 10 of the Convention³ declares that the Constitution of Malta allows such restrictions to be imposed upon public officers in regard to their freedom of expression as are reasonably justifiable in a democratic society. The code of conduct of public officers in Malta precludes them from taking an active part in political discussions or other political activity during working hours or on official premises.

3. The Government of Malta, having regard to Article 64 of the Convention declares that the principle of lawful defence admitted under sub-paragraph (a) of paragraph (2) of Article 2 of the Convention⁴ shall apply in Malta also to the defence of property to the extent required by the provisions of paragraphs (a) and (b) of section 238 of the Criminal Code of Malta, the text whereof, along with the text of the preceding section 237, is as follows:

'237. No offence is committed when a homicide or a bodily harm is ordered or

¹ We think mainly (without intending to express any firm opinion) of the European Convention relating to the Formalities required for Patent Applications (11 December 1953) and of the European Convention on the International Classification of Patents for Invention (19 December 1954), which are *ipso jure* open to all Members of the International Union for the Protection of Industrial Property.

² Article 6 (2) reads as follows: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

³ Article 10 is worded as follows:

'1.—Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

'2.—The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

⁴ According to Article 2 (2) (a), 'Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence . . .',

permitted by law or by a lawful authority, or is imposed by actual necessity either in lawful self-defence or in the lawful defence of another person.

'238. Cases of actual necessity of lawful defence shall include the following:

- (a) where the homicide or bodily harm is committed in the act of repelling, during the night-time, the scaling or breaking of enclosures, walls, or the entrance doors of any house or inhabited apartment, or of the appurtenances thereof having a direct or an indirect communication with such house or apartment;
- (b) where the homicide or bodily harm is committed in the act of defence against any person committing theft or plunder, with violence, or attempting to commit such theft or plunder;
- (c) where the homicide or bodily harm is imposed by the actual necessity of the defence of one's own chastity or of the chastity of another person.'

4. The Government of Malta, having regard to Article 64 of the Convention, declares that the principle affirmed in the second sentence of Article 2 of the Protocol¹ is accepted by Malta only in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure, having regard to the fact that the population of Malta is overwhelmingly Roman Catholic.²

¹ The second sentence of Article 2 of Protocol No. 1 provides that 'in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.

² It may be of interest to note that at the time of signing Protocol No. 1 (20 March 1952), the United Kingdom Government declared '... that, in view of certain provisions of the Education Acts in force in the United Kingdom, the principle affirmed in the second sentence of Article 2 [was] accepted by the United Kingdom only so far as it [was] compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure'. This declaration, as opposed to that of Malta, does not refer expressly to Article 64 of the Convention. As to whether or not it constitutes a real reservation, see in particular the Report of the European Commission of Human Rights on the applications lodged against Belgium by six groups of Belgian citizens ('linguistic cases'), Doc. DH (65) 3, paras. 220 and 267, pp. 188-9 and 235.

THE ACQUISITION OF TITLE TO TERRITORY BY NEWLY EMERGED STATES*

By J. G. STARKE Q.C.

Institute of Advanced Studies, Canberra

IN the last decade an unprecedentedly large number of new States have been admitted into the international community. As is well known, these have been preponderantly African and Asian States, and it may be that in the future they will inspire material alterations in the existing traditional rules of international law which have had their origin in the relations between States belonging preponderantly to Europe, and North and South America.

This is said in order to make it clear that the present article is not at all concerned with the problem of whether such newly emerged States may exercise some influence in bringing about alterations in the existing principles of international law concerning the acquisition of title to territory. Nor does it purport to formulate any thesis that after newly emerged States have been in existence some time, different rules as to the acquisition of new territory should apply to such States and to the States which were members of the international community already.

The article deals with the position of newly emerged States at the time statehood is attained, and territory has come under the sovereignty of their governments. The problem is almost entirely one of theoretical analysis and of endeavouring, in particular, to ascertain whether there is a need to alter or extend the existing theoretical structure of international law, so far as it concerns the acquisition of territory, to meet the recent numerous instances of emergence of new States and therefore of inception of new State territorial titles.

First it may be observed that the attainment of statehood, with such new territorial title of the State concerned, has been and may be achieved in different ways. A colonial or dependent territory may by the agreement or assent of the parent State be conceded independence. This may or may not involve a formal agreement between the parent State and the colonial or dependent territory: when Burma attained statehood, there had been a prior Burma-United Kingdom agreement dated 27 June 1947, and a later formal Treaty signed on 17 October 1947, leading eventually to independence. Or there may or may not be also some internal constitutional act or internal legislation by the parent State by which the new statehood is provided for in express terms. Again, there is the case of Burma, in respect of which the United Kingdom legislature enacted the Burma Independence Act, 1947, section 1 of which provided that on the 'appointed day', 4 January 1948, Burma was to become an independent country. A further illustration in that connection is the Ceylon Independence Act, 1947. A colonial or dependent territory is one thing, the case of a people as such, by some plebiscite or act of self-determination, choosing independence is another. The Algerian people perhaps represent a case in point, inasmuch as strictly speaking no colonial or dependent territory was involved, and the people, by a referendum on self-determination conducted on 1 July 1962, opted for independence from France.

Into this category of peoples as such moving towards statehood it seems possible to

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fit the case of trust territories under the United Nations Charter becoming emancipated, for the trust territory is certainly not a colonial or dependent territory of the Administering Authority which has entered into a trusteeship agreement in respect of the trust territory concerned. The concern of the United Nations has been to bring about the independence of the people, although it has had to attend to the formalities, as, for example, when by resolution of the General Assembly a trusteeship is dissolved. There have been one or two interesting variations in the pattern of emancipation of a trust territory, which perhaps serve also to confirm the importance of the people concerned, rather than the nature of the trust territory viewed as a formal entity. Thus when Belgium was discharged from its trusteeship over the trust territory of Ruanda-Urundi in 1962, a single State of Ruanda-Urundi did not emerge but two separate States, Burundi and Rwanda. Moreover there have been the 'mixed' cases of independence, when a trust territory has combined with a colonial or dependent territory to form a newly constituted State; illustrations are the merger of the British trust territory of Togoland with the British colonial territory, Gold Coast, to form the new State of Ghana in 1957, and the union of the Italian trust territory of Somaliland with British Somaliland, constituting in 1960 the new Somali Republic.

It has to be considered also that one of the extraordinary features of this multiple emergence of new States was the almost immediate general recognition they received from the Great Powers. Where the parent State had conceded independence, on the one hand, or where, on the other hand, the emancipation of the trust territory had taken its course under the auspices of the United Nations, consummated by the appropriate Resolution or Resolutions of the General Assembly, it was hardly open to States other than the parent State or other than the State which was the Administering Authority (in the case of a trust territory) to defer recognition upon one or more of the grounds usually called in aid for this purpose.

Mention may also be made of the historical cases of States which have been formed by revolution or secession. The revolution need not necessarily be one in which violence has been used. The difference from the cases above-mentioned is that the State from which a portion of its population and a portion of its territory have broken away has not immediately conceded that the revolution or secession has legally resulted in the emergence of a new State.

Having stated in broad outline the circumstances in which most newly emerged States have obtained their footing in the international community, the next step is to pose, albeit rhetorically, the theoretical questions which relate to the territorial title of such States.

1. *Modes of acquisition of territorial title*

(a) Has, as Oppenheim thought,¹ the acquisition of territorial title nothing to do with the foundation of a new State, or is there in that connection an acquisition of territorial title, original or derivative? (b) If there is such an acquisition, can it be fitted within the traditional categories of modes of acquisition of territory (in this case, the only appropriate modes, if at all, would seem to be occupation or cession), or has the practice of the last decade shown that there may be one or more new heads of acquisition?

2. *Who does acquire the territorial title?*

Assuming that there is, contrary to Oppenheim's view, an acquisition of territorial title, who does acquire such title?

¹ Oppenheim, *International Law*, vol. 1 (8th ed., 1955), p. 544.

The reason that the question is posed in this way is that there is a traditional view (see below) that territory is one of the essential elements of statehood. Theoretically, therefore, it could be said that the territorial title must have been acquired before the newly emerged State came into being, for until it was created, with territory as a *sine qua non* of its personality, it was incapable of acquiring title. What entity is it then that does acquire territorial title? Is it the people whose self-determination has led to statehood? Or can we speak of an entity such as an 'emerging State' in whom the title can become vested pending its evolution into a State?

3. *Has recognition any bearing upon the matter?*

This brings us back again four-square to the difference between the declaratory and constitutive theories of recognition, and also indeed to the difference between the two kinds of constitutive theories, the traditional constitutive theory and the constitutive theory espoused by the late Sir Hersch Lauterpacht, under which States other than the entity to be recognized are under a duty to accord recognition if all the elements of statehood, including the element of territory, are present, whereupon recognition operates constitutively.

Having posed these questions, it may be appropriate to glance at some of the views expressed by writers on international law.

The writer is indebted to Professor Jennings for first having raised the problem, subject of the present article, so that we may well begin by referring to his views, expressed in his book, *The Acquisition of Territory in International Law*.¹ Professor Jennings does not, *semble*, treat the cases of newly emerged States as involving some new mode of acquisition of territorial sovereignty. He concedes that the classical modes of acquisition of territory assume some activity upon the part of an existing international person, that is to say a State,² but mentions the difficulty that until a new State is actually created, there is in law no international person capable of taking title.³ He is prepared to regard title as accruing either from the fact of the emergence of the new State or from recognition.⁴ If recognition were thus a root of title to territory, according to the alternative view expressed by Professor Jennings, then the declaratory theory of recognition could not apply to the newly emerged States of the last decade, for territory being one of the essential qualifications of statehood, this qualification would not be established until recognition. Therefore, the constitutive theory would have to be preferred, and what is more, we should have to regard the totality of the numerous acts of recognition by which title is thus finally established as an international quasi-adjudication of territory.

Professor Jennings also makes the point that the process of development of territorial title may begin within the sphere of domestic jurisdiction.⁵ Presumably, this is a reference to constitutional acts or legislation by the parent State whereby independence is conceded, or to acts or processes of self-determination. Both these aspects were mentioned at the beginning of the present article.

Some writers have dealt with the question whether revolution and secession are independent modes of acquisition of territorial title.

Hackworth appears to have included revolution and secession within the modes of acquisition of territory; the relevant passage in his *Digest*⁶ is as follows:

'Revolution and secession constitute a historically familiar method of effecting changes in territorial sovereignty. They usually involve a declaration of independence from former

¹ (1963), pp. 7, 8, 11, 37 and 80.

² *Ibid.*, p. 7.

³ *Ibid.*, p. 11.

⁴ *Ibid.*, p. 8; but see also p. 37.

⁵ *Ibid.*, p. 80.

⁶ (1940), vol. 1, p. 444, s. 65.

political ties, withdrawal from the jurisdiction of the former sovereign, and the maintenance of the new independent status as the result either of military operations or of the acceptance of the situation by States in a position to challenge.'

Hackworth's *Digest* is, in that connection, in contrast with the earlier Moore's *Digest*, for although Moore deals elaborately and in detail with the different modes of acquisition of territorial sovereignty,¹ he makes no reference to revolution or secession as a mode of such acquisition.

Dickinson also adopted the view expressed by Hackworth, for in his book, *The Law of Peace*, he stated that revolution is a form of acquisition of territory, and that the 'transfer by revolution is perfected by the revolution's success'.²

Hyde is another United States international lawyer who was prepared to treat revolution as a mode of acquisition of territorial sovereignty, and according to him it was one *sui generis*, involving no activity either upon the part of the parent State, or upon the part of the newly emerged revolutionary State. Moreover, according to Hyde the *ratio* of this acquisition of territory is, to some extent, succession. One wonders why Hyde did not explicitly state that succession itself was a mode of acquisition, unless he was conscious of the theoretical difficulty to which Professor Jennings drew attention, namely that if territory be an essential qualification of statehood, then it is difficult to describe a revolutionary State as having 'acquired' or 'succeeded' to territorial sovereignty. However, the relevant passage from his treatise³ does not suggest that he did have the theoretical difficulty in mind:

'When by virtue of a successful revolution a new State comes into being, it necessarily succeeds to the rights of sovereignty over the territory which it occupies and which previously belonged to the parent State. No act on the part of the latter is required in order to validate the succession. The new State is regarded as having perfected by its own achievement the transfer of rights of property and control.'

This passage purports to be based on a proposition formulated in a dispatch in 1856 by Secretary of State Marcy:

'The United States regard it as an established principle of public law and of international right that when a European colony in America becomes independent it succeeds to the territorial limits of the colony as it stood in the hands of the parent country.'

If territory were an essential ingredient of statehood, Secretary Marcy's proposition would be more exact than Hyde's statement of the principle, for Secretary Marcy speaks of succession only to the 'territorial limits', the assumption being that the revolutionary State has fulfilled the territorial qualification.

Turning aside from revolutions or secessions, can a plebiscite or any other form of act of self-determination be regarded as a method of acquisition of territorial sovereignty?⁴ *Semble*, not, because these are merely processes for testing whether a people, and admittedly the term 'people' is relative and fluid, can ultimately form a new State with a particular area of territory inhabited by it.

So far as the recent practice goes, it is neutral and inconclusive.⁵ The specific problem of acquisition of territorial sovereignty does not seem to have troubled any of the draftsmen of the Resolutions, documents or agreements associated with the formation of the new States of the past decade. They seem to have been more concerned

¹ *Digest* (1906), vol. 1, pp. 258-301, ss. 80-89.

² (1951), p. 47; see also p. 46.

³ *International Law* (1947), vol. 1, p. 390.

⁴ Cf. Whiteman's *Digest* (1963), vol. 2, pp. 1168-73.

⁵ See for convenient conspectus *ibid.*, pp. 119-242.

with the termination of the condition of dependence of the colonial or trust territories in question, and with their attainment of statehood, particularly the date or time of this event. To this extent, it could perhaps be said that recent practice supports the Oppenheim thesis that the acquisition of territory is not to be confused with the foundation of a new State.

The documentary materials do not suggest even the possibility that the parent States concerned considered themselves as making a cession, express or implied, of territorial sovereignty to their former dependents. This would be in accordance with principle under international law. It should not be an invariable requirement that if territory formerly of State A is acquired by another entity or State, State A must evince an *animus disponendi*.

Yet if the documentary materials throw little light on the problem, the facts themselves cannot be denied. Dependent entities or peoples did become seised of the sovereignty *de facto* of territory, in some instances before the proclamation of the foundation of the State concerned.

It is believed, indeed, that it is time to discard the hard-frozen technicality that only States can acquire plenary territorial sovereignty. Such a rigid conception of international law is unacceptable to the new group of Afro-Asian States. It seems to over-emphasize unduly the importance of the State as such, a Hegelian notion which has been with us for a long time and is not well received by the newly emerged States. We should adjust ourselves to the idea that a people, as such, is capable of acquiring sovereignty over territory pending the foundation of the State of which such territory is to be the constituent element. This is preferable indeed to saying that an 'emerging State' may acquire territorial sovereignty, because then we are seeking to introduce a fiction to avoid squaring up to a reality. In this connection the practice of the last decade and the views of the newly emerged States themselves as to the rights of peoples are matters which cannot be ignored.

There is nothing in such an approach which can do violence to the underlying purposes of international law. Precedents do exist for the assumption of territorial sovereignty by an entity, not a State; see, for example, Article 3 of the Treaty between Italy and the Vatican, signed on 11 February 1929 under which Italy recognized the full possession and exclusive and absolute power and sovereign jurisdiction of the Holy See over the Vatican 'as at present constituted', with all its appurtenances and endowments.

By admitting that a people can acquire territorial sovereignty pending statehood, we avoid the theoretical dilemma referred to by Professor Jennings.¹ It does not matter whether the case be one of the people of a dependency, or of a trust territory, or of a combination of the people of a dependency and of the people of a trust territory. The General Assembly resolution which may be necessary with respect to a trust territory to discharge the Administering Authority from its responsibilities and to confirm the independence of the people, has no bearing upon the question of acquisition of territorial sovereignty. It cannot and ought not to be deemed, expressly or impliedly, an adjudication of territory.

Assuming that a former dependent people can acquire territorial sovereignty, how is the mode of acquisition to be described? There is no occupation, because there is no *res nullius*, and there is no cession. In the case of a dependency, but not in the case of a trust territory, it might be said that there has been a succession, but the term 'succession' seems more appropriate to describe the result than the mode, in the absence of

¹ Above, p. 413.

some actual international instrument comparable to a deed of transmission under State law. It is perhaps best left as a case of acquisition *sui generis*.

The concept of dependent peoples acquiring territorial sovereignty pending the attainment of statehood obviates, too, any aggravation of the present theoretical difficulties which already bedevil the question whether recognition is declaratory or constitutive in operation. In other words, recognition is quite irrelevant so far as the acquisition of sovereignty over territory is concerned.

The same analysis could indeed be applicable to most cases of emergence of revolutionary States. However, the writer would prefer to limit the views stated in this article to the instances of newly emerged States during the past decade.

It remains to mention two qualifications, corresponding to special cases which might arise:

1. The parent State might by some definitive instrument actually make a cession of territorial sovereignty to a dependent people.
2. A newly emerged State may almost immediately after its foundation receive an addition of territory as to which there may have been a prior dispute. This could only be a case of acquisition by a State, and not by a people, but whether the mode of acquisition be cession or international adjudication must depend upon the particular circumstances under which the territory was received, and the terms of any relevant treaties or instruments.

LEGAL ASPECTS OF OUTER SPACE: RECENT DEVELOPMENTS*

By J. F. MCMAHON, LL.B. (Cambridge), LL.M. (Harvard)

THE purpose of this note is to indicate the developments in the law of space since the author's article in this *Year Book* in 1962. The recent developments will be discussed under two heads. First, the relationship between the Space Treaty concluded at the United Nations in December 1966¹ and the unanimous Resolution adopted by the General Assembly in December 1963; secondly, an analysis of each of the Articles contained in the Space Treaty.²

I. RESOLUTION AND TREATY

The importance of the Treaty in relation to the Resolution is twofold. It enables one to determine with confidence what legal principles bind States in the exploration of outer space and it includes a number of new provisions which were not contained in the 1963 Resolution.³

(a) Prior to the conclusion of the Treaty the state of the law regulating activities in outer space was uncertain. The reason for the uncertainty stemmed from the fact that the law was propounded either in the form of resolutions adopted by the General Assembly or of statements made by the representatives of governments in the various committees of the General Assembly.⁴ Therefore it could be based only on customary international law or on resolutions adopted by the General Assembly.

This fact gives rise to a number of interesting questions concerning the sources of international law and on the role of the United Nations in the development of international law. What is the authority of a resolution of the General Assembly? Is its authority different, from the legal view, if it is a unanimous resolution or one of a series of unanimous resolutions on the same subject? Is there a distinction between an ordinary resolution and a solemn 'declaration of legal principles . . .' ? What is the status of a resolution which is only partly declaratory of the existing law when a State maintains that it regards the whole resolution as a statement of the law? Concerning customary law and the development of law for outer space it could be argued that despite the intensity of the practice, the time has been too short, the participants too few and the evidence of *opinio juris* too meagre, for the emergence of any clear rules of customary law.⁵ On the other hand, it could be maintained that the cumulative effect of the United Nations resolutions, innumerable statements by delegates in the General Assembly and an unratified treaty signed by thirty States, might be to create customary

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¹ Treaty of Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies.

² For ease of reference and comparison the texts of the Treaty and of the Resolution are appended at the end of this Note.

³ Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.

⁴ The Political Committee; the *Ad Hoc* Committee on the Peaceful Uses of Outer Space, 1959; the Committee on the Peaceful Uses of Outer Space; and its Legal Sub-Committee.

⁵ See this author's article in this *Year Book*, 38 (1962), pp. 340-57.

law. In particular, this might be argued concerning the question of sovereignty.¹ The problem, however, is that the line between usage and custom is so tenuous and indistinct that it is difficult to determine without leaving room for uncertainty.

This uncertainty was reflected in the statements of many of the delegates during the drafting of the Space Treaty in Geneva. A number of delegates adopted the position that the 1963 Resolution of the General Assembly was either declaratory or constitutive of the law. Other delegates emphasized the need for a Space Treaty on the ground that resolutions of the General Assembly were merely persuasive and not legally binding.

On 20 October 1966, in the legal sub-committee at Geneva, the American delegate referred to the 1963 Resolution and stated:

'The United States had taken the position that those principles constituted international law as it was accepted by the members of the United Nations, and it was a source of great satisfaction that in the two and a half years since the adoption of the Declaration there had not been any dispute about the nine principles it contained.'²

The Resolution was, however, viewed somewhat differently by the Russian delegate:

'... the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space which had been adopted by the General Assembly in 1963 as its Resolution 1962 (XVIII), although a significant step forward, made no provision for accession by all States and was not binding on States.'³

The standpoint of the French delegate was similar:

'There was little existing material on which to base the development of space law: a number of resolutions by the General Assembly, and the draft Treaties put forward by the United States of America and the U.S.S.R. respectively. Since Assembly resolutions were declarations of intent, even when adopted unanimously, and could give rise to no legal obligations, the legal principles governing the activities of States in the exploration and use of outer space adopted in Assembly Resolution 1962 (XVIII) would become binding only when incorporated in international agreement. Those principles could therefore serve only as a guide. Moreover, they should be reviewed in the light of the many developments in the years since their adoption.'⁴

The Austrian delegate referred to other possible sources of law:

'In reply to two statements made at the previous meeting he observed that international obligations derived not only from treaties but also—as indicated in Article 38 of the Statute of the International Court of Justice—from custom and the general principles of law recognized by civilized nations. That applied to General Assembly Resolution 1962 (XVIII), but he nevertheless considered it desirable that a Treaty should be concluded in order to render the principles stated in that Resolution more precise.'⁵

It will be evident from these observations of delegates that the state of the law prior to the conclusion of the Treaty remained unclear, and one of the principal merits of the Treaty is the greater certainty which it brings to the law. 'The Treaty's main advantage', said the First Committee in its report, 'was that the many principles embodied in previous General Assembly resolutions were now incorporated in the form of an international agreement which, after its signature and ratification by a number of States, would have binding legal force.'⁶ The authority of a resolution of the General Assembly

¹ *This Year Book*, 38 (1962), p. 357.

² U.N. Doc. A/Ac. 105/C. 2/SR 57, 20 October 1966, Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space, p. 5.

³ *Ibid.*, pp. 9–10.

⁴ *Ibid.*, p. 15.

⁵ *Ibid.*, p. 3.

⁶ U.N. Doc. A/Ac. 1/SR. 1492, 28 December 1966, First Committee of the General Assembly, p. 12.

might be impugned and the emergence of a custom disputed; but no State could question the binding force of a treaty for the parties.

(b) The second advantage of the Treaty is that it includes a number of important new provisions not contained in the 1963 Resolution. These new provisions will merely be indicated briefly as they will be discussed in more detail in the analysis of the individual Articles of the Treaty.

Perhaps the most remarkable innovation is the interpretation of the word 'peaceful' in Article IV of the Treaty to mean non-military rather than merely non-aggressive. This Article, inspired by Article 1 of the Antarctica Treaty, prohibits the placing of weapons of mass destruction around the earth and the establishment of any military bases on celestial bodies. Although the Article is subject to a number of severe limitations which will be discussed more fully later, it represents an important step forward in the attempt to demilitarize outer space.

A second innovation, also inspired by the Antarctica Treaty, is the provision in Article XII concerning inspection facilities. All stations, installations, equipment and space vehicles on the moon and other celestial bodies are to be open to representatives of other States who are parties to the Treaty. However, reasonable notice must be given in advance and the provision is to operate 'on a basis of reciprocity'.¹

A further innovation concerns the provision of tracking facilities and the undertaking by States who are parties to the Treaty to 'consider on a basis of equality any requests by other States parties to the Treaty to be afforded an opportunity to observe the flight of space objects launched by those States'.²

The Treaty also regulates the dissemination of information obtained by States from their activities in outer space. Under Article XI, parties to the Treaty agree to inform the Secretary-General of the United Nations, as well as the public and the scientific community, of the nature and results of activities in outer space. The agreement to inform the Secretary-General is qualified by the words 'to the greatest extent feasible and practicable'.³

Under Article V of the Treaty, parties undertake immediately to inform other parties or the Secretary-General of the United Nations of any phenomena they discover in outer space including the moon and other celestial bodies, which could constitute a danger to the life or health of astronauts. This is a new provision which is not contained in any of the earlier resolutions of the General Assembly.

Finally one may note the important amendment procedure under Article XV of the Treaty. Amendments are to enter into force for each State party to the Treaty accepting the amendments, upon their acceptance by a majority of the States parties to the Treaty. Concerning the remaining States, amendments will enter into force only on the date of the acceptance of the amendment by a State.

The relationship between the 1966 Space Treaty and the 1963 Resolution will now be considered from two further points of view: first, the extent to which the Treaty simply regurgitates the provisions of the Resolution; and, secondly, the defects of the Treaty.

On the first point, there can be no doubt that in many cases the Space Treaty adopts the provisions and even the identical language of the 1963 Resolution. The Preamble to the Treaty and eight of the Articles of the Treaty, repeat in almost identical language the provisions of the 1963 Resolution. Article I concerning exploration,⁴ Article II

¹ See Article XII of the Treaty of Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

² *Ibid.*, Article X.

³ *Ibid.*, Article XI.

⁴ See §§ 1 and 2 of the 1963 Resolution.

concerning non-appropriation,¹ Article III concerning the relevance of international law,² Article V concerning astronauts,³ Article VI concerning responsibility,⁴ Article VII concerning liability,⁵ Article VIII concerning jurisdiction and ownership⁶ and Article IX concerning nuisance⁷ are all taken from the 1963 Resolution. Therefore, almost half the provisions of the Treaty merely reflect principles already embodied in the 1963 Resolution. However, the important difference is that the legal authority and status of these principles is now made plain by virtue of their incorporation in a treaty.

A number of shortcomings of the Treaty may now be indicated. First, the drafting in a number of cases is imprecise and ambiguous. It is difficult, for example, to ascertain the exact meaning of 'on the basis of reciprocity' in Article XII, 'on the basis of equality' in Article X, 'internationally liable' in Article VII, 'due regard' in Article IX and 'agree to inform . . . to the greatest extent feasible and practicable' in Article XI.

Secondly, there is no provision for an authoritative interpretation of such ambiguities in the text. Nor is there any machinery for the settlement of disputes. The American Draft Treaty made provision for the reference of disputes to the International Court of Justice,⁸ but this provision was not adopted in the final text.

Thirdly, there is no sanction for non-observance of the provisions of the Treaty.

Fourthly, Article XVI permits withdrawal from the Treaty only one year after its entry into force. Such withdrawal takes effect one year from the date of receipt of the notification.

Fifthly, one can only deplore the omission of the word 'moon' from Article IV (2) of the Treaty. The implications of this omission will be discussed more fully later.

However, despite these defects, the Treaty represents a most important and progressive step in the formulation of law for outer space.⁹

¹ See §3 of the 1963 Resolution.

² Ibid., §4.

³ Ibid., §9.

⁴ Ibid., §5.

⁵ Ibid., §8.

⁶ Ibid., §7.

⁷ Ibid., §6.

⁸ See the American Draft Treaty Governing the Exploration of the Moon and other Celestial Bodies, U.N. Doc. A/Ac. 105/35, 16 September 1966, Report of the Legal Sub-Committee on the work of its Fifth Session, p. 8, Article 11. 'Any disputes arising from the interpretation or application of this Agreement may be referred by any Contracting Party thereto to the International Court of Justice for decision.'

See also, *ibid.*, the Russian Draft Treaty, Article 10: 'In the event of Disputes Arising in connexion with the application or interpretation of the Treaty, the States Parties concerned shall immediately consult together with a view to their settlement.'

⁹ See U.N. Doc. A/Ac. 105/C. 2/SR 59, 24 October 1966, Legal Sub-Committee, p. 5; Sir Kenneth Bailey (Australia) 'noted first the present utility of preparing a treaty in this field. The starting point of the two draft treaties before the Sub-Committee was General Assembly Resolution 1962 (XVIII), unanimously accepted as a statement of the principles by which States should be guided in the exploration and use of outer space. There were, however, different views as to the place of such a resolution of the General Assembly in the creation and development of international law. Probably no delegation would claim that by virtue of its adoption by the General Assembly a resolution *ipso facto* became part of international law. Certainly the delegation of Australia did not. The representative of the United States had referred to the well-known statement of his distinguished predecessor Mr. Stevenson to the effect that the United States regarded the Declaration of Legal Principles as a statement of accepted international law by which all had agreed to be bound. But different views had been expressed even in the Sub-Committee, as for instance by the delegation of France, with regard to the binding character of the principles contained in the Declaration. That being so, and given the pace of contemporary development, it was highly desirable that the terms of Resolution 1962 (XVIII) should now be given binding legal form in an instrument that would automatically become, for the parties, one of the sources of international law.'

II. THE SPACE TREATY

Introduction. Two Draft Treaties, one by Russia and one by the United States, were submitted to the Legal Sub-Committee when it met in Geneva in July 1966. The American Treaty, based on the 1963 Resolution of the General Assembly and the Antarctica Treaty of 1959,¹ was limited to the moon and other celestial bodies.² The Russian draft, also based on the 1963 Resolution of the General Assembly, was more comprehensive and dealt with the 'principles governing the activities of States in the exploration and use of outer space, the moon and other celestial bodies'.³ Subsequently, the American delegation agreed that the Treaty should also extend to outer space⁴ and the Russian delegation agreed to consider a number of provisions which were not included in their original draft.⁵ Meetings were held in Geneva from 12 July until 4 August 1966 and agreement was reached on eight Articles covering thirteen points, to be incorporated in a treaty.⁶ However, disagreement remained on important points such as access to installations on celestial bodies, the making of reports and tracking facilities.⁷ Further meetings were held in New York from 12 September to 16 September 1966, but no final agreement was reached.⁸ However, negotiations continued and resulted in the final adoption of the Treaty in December 1966. Each Article of the Treaty will now be analysed in more detail.

Preamble. As the preamble to the Space Treaty follows closely the preamble to the 1963 Resolution, two points only need be noted. First, it includes a reference to the General Assembly Resolution 1884 (XVIII) which called upon States to refrain from placing weapons of mass destruction in orbit. The allusion to this Resolution is readily explicable in the context of Article IV of the Treaty and the demilitarization of outer space. Secondly, the preamble, like the 1963 Resolution, refers to a previous resolution of the General Assembly condemning propaganda designed to provoke a threat or breach of the peace. The United Arab Republic had, indeed, proposed an Article dealing generally with the use of outer space for propaganda purposes,⁹ but this proposal was not adopted.

Articles I-III. These Articles call for little comment. They were three of the eight Articles on which agreement was quickly reached in Geneva¹⁰ and merely repeat the first four provisions of the 1963 Resolution. They embody principles which had been

¹ U.N. Doc. A/Ac. 105/C. 2/SR 57, 20 October 1966, Legal Sub-Committee, p. 6.

² U.N. Doc. A/Ac. 105/35, 16 September 1966, Report of the Legal Sub-Committee, p. 6.

³ *Ibid.*, p. 12.

⁴ U.N. Doc. A/Ac. 105/C. 2/SR 63, 20 October 1966, Legal Sub-Committee, pp. 2-3.

⁵ *Ibid.*

⁶ U.N. Doc. A/Ac. 105/C. 2/SR 71/Add. 1, 1 September 1966, Legal Sub-Committee, pp. 1-13.

⁷ *Ibid.*, pp. 14-28.

⁸ U.N. Doc. A/Ac. 105/C. 2/SR 73, 19 October 1966, Legal Sub-Committee, p. 14.

⁹ U.N. Doc. A/Ac. 105/35, 16 September 1966, Report of the Legal Sub-Committee, Annex III, p. 9. 'The Parties to the Treaty, recognizing the enormous potentialities of space applications for communication purposes and more specifically for sound and television broadcasting, undertake to make use of such applications only in accordance with the resolutions of the General Assembly which condemn using the media of information for hostile propaganda and urge States to utilize them for promoting friendly relations among nations, based upon the purposes and principles of the Charter. In particular, they shall undertake to regulate at the world-wide level, direct broadcasting by artificial satellites, as regards both its technical and programme contents aspects. They undertake to refrain from using communication satellites for direct broadcasting until such regulations are set by the competent international organizations.'

¹⁰ U.N. Doc. A/Ac. 105/C. 2/SR 71/Add 1, 1 September 1966, Legal Sub-Committee, pp. 6, 10-11.

enunciated and accepted by delegates to the General Assembly since 1959.¹ In Article I, paragraph 2, however, it is important to note the addition of the words '... and there shall be free access to all areas of celestial bodies', words which first appeared in the Russian Draft Treaty.² Paragraph 3 of Article I concerning 'freedom of scientific investigation' is also new³ and does not appear in the 1963 Resolution. The three Articles merely confirm that claims to sovereignty in outer space, by means of use⁴ or occupation, are not permissible and the rules of international law and the Charter extend to outer space.⁵

Article IV. This Article was inspired by Article I of the Antarctica Treaty.⁶ The purpose of the Article was to interpret the word 'peaceful' to mean non-military and not merely non-aggressive. To achieve this purpose it was agreed not to place weapons of mass destruction in orbit around the earth. It was also agreed not to establish military bases or conduct military activities on celestial bodies. However, on account of two important omissions, the Article does not succeed in totally prohibiting military activities in outer space. First, as there is no mention of outer space in paragraph 2 of Article III, it would seem that it is permissible to conduct military activities in outer space, except for the restriction on placing weapons of mass destruction in orbit. Secondly, the inference to be drawn from reading paragraph 2 of Article III is that the prohibition on military bases and activities does not extend to the moon but only applies to celestial bodies.

The first paragraph of Article IV concerning the placing of weapons of mass destruction in orbit simply makes legally binding an agreement which previously was embodied in a General Assembly resolution.⁷ The second paragraph first appeared in Article 9 of the American Draft Treaty and Article IV of the Russian Draft Treaty.⁸ Revised versions of these Articles were later submitted⁹ and agreement reached on the final text, except for the words 'installations' and 'equipment',¹⁰ at Geneva. Both these

¹ See this author's article in this *Year Book*, 38 (1962), pp. 339-60.

² U.N. Doc. A/Ac. 105/35, 16 September 1966, Report of the Legal Sub-Committee, p. 12.

³ Ibid., Articles 2 and 3 of the American Draft Treaty, p. 6.

⁴ For a discussion concerning the meaning of the word 'use', see U.N. Doc. A/Ac. 105/C. 2/SR 63, 20 October 1966, Legal Sub-Committee, p. 8.

⁵ One or two States reserved their position on this question, see U.N. Doc. A/Ac. 105/C. 2/SR 71, 1 September 1966, Legal Sub-Committee, p. 17.

⁶ Article 1 of the Antarctica Treaty 1959: 1. 'Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measure of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manœuvres, as well as the testing of any type of weapons.'

⁷ G.A. Resolution 1884 (XVIII). This Resolution is referred to in the preamble to the Space Treaty. See also Article 8 of the American Draft Treaty and Article IV of the Russian Draft Treaty; U.N. Doc. A/Ac. 105/35, 16 September 1966, Report of the Legal Sub-Committee, pp. 7 and 13.

⁸ Ibid. Article 9 of the American Draft Treaty states: 'Celestial bodies shall be used for peaceful purposes only. All States undertake to refrain from conducting on celestial bodies any activities such as the establishment of military fortifications, the carrying out of military manœuvres, or the testing of any type of weapons. The use of military personnel, facilities or equipment for scientific research or for any other peaceful purpose shall not be prohibited.' Article IV of the Russian Draft Treaty states: '... the moon and other celestial bodies shall be used exclusively for peaceful purposes by all parties to the Treaty. The establishment of military bases and installations, the testing of weapons and the conducting of military manœuvres on celestial bodies shall be forbidden.'

⁹ Ibid., Annex III, p. 4 (the American revision) and Annex III, p. 7 (the Russian revision).

¹⁰ U.N. Doc. A/Ac. 105/C. 2/SR 71/Add. 1, 1 September 1966, p. 7. See also, U.N. Doc. A/Ac. 105/C. 2/SR 70, 21 October 1966, Legal Sub-Committee, p. 3, statement of the U.S.S.R. delegate: '... it could not agree to the use of military equipment on celestial bodies, even on the

words were included in the final text of the Treaty and the term 'facility' was added. This exception, permitting military personnel and equipment to be used for peaceful and scientific exploration, is similar to Article 1 (2) of the Antarctica Treaty of 1959.¹

The omission of the term 'outer space' from Article IV, paragraph 2, was commented on by a number of delegates: 'It was to be regretted that the two drafts provided for the non-militarization of the moon and other celestial bodies but not for that of outer space.'²

The omission of the term 'moon' from the second sentence of paragraph 2 was also the subject of comment.³ The omission would seem to be deliberate as in every other case in the Treaty the moon is referred to explicitly rather than included implicitly in the term 'celestial bodies'.⁴ Such an omission can only be a matter for regret.

Article V. Agreement on this Article, concerning astronauts, was soon reached at Geneva.⁵ It merely restates the provisions of paragraph 9 of the 1963 Declaration. However, the final paragraph, where States undertake immediately to inform other States or the Secretary-General of any phenomena in space which could constitute a danger to astronauts, is quite new.⁶ The conclusion of a Treaty on the question of astronauts has been under discussion for several years.⁷

Article VI. This Article concerning international responsibility for activities in outer space calls for little comment. It repeats in almost identical language paragraph 5 of the 1963 Resolution and may be found in Article VI of the Russian Draft Treaty.⁸ In 1962 the Russian delegate was opposed to non-governmental entities' participating in the exploration of outer space.⁹ However, the 1963 Resolution and 1966 Treaty indicate that the Russians have accepted the view that non-governmental entities may participate if they are authorized and supervised by the State and the State bears international responsibility.

Article VII. This Article, dealing with international liability for damage, again repeats the substance and language of paragraph 8 of the 1963 Resolution. It appears in Article VII of the Russian Draft Treaty¹⁰ and was one of the eight Articles agreed to at

pretext of carrying out scientific research or other peaceful undertakings, for that might result in activities which would run directly counter to the principle of the use of celestial bodies exclusively for peaceful purposes.' See further U.N. Doc. A/Ac. 105/C. 2/SR 71, 1 September 1966, Legal Sub-Committee, p. 6.

¹ 'The present treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.'

² U.N. Doc. A/Ac. 105/C. 2/SR 62, 24 October 1966, Legal Sub-Committee, p. 4.

³ U.N. Doc. A/Ac. 105/C. 2/SR 65, 24 October 1966, Legal Sub-Committee, p. 10, statement of the U.S.S.R. delegate: 'The Soviet Union could not accept the second sentence in the new United States text. For the sake of consistency, it would be better to speak of "the moon and other celestial bodies" rather than "celestial bodies".'

⁴ See, for example, the title of the Treaty: 'Treaty of Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies.' However, see the revised American draft Article which could be interpreted to include the moon, U.N. Doc. A/Ac. 105/35, 16 September 1966, p. 4.

⁵ U.N. Doc. A/Ac. 105/35, 16 September 1966, Report of the Legal Sub-Committee, Annex II, p. 6; *ibid.*, Article 5 of the American Draft Treaty and Article IX of the Russian Draft Treaty.

⁶ U.N. Doc. A/Ac. 105/C. 2/SR 57, 20 October 1966, Legal Sub-Committee, pp. 7 and 13. See also, U.N. Doc. A/Ac. 105/C. 2/SR 66, 21 October 1966, Legal Sub-Committee, p. 8.

⁷ See this author's article, *loc. cit.*, p. 360.

⁸ U.N. Doc. A/Ac. 105/35, 16 September 1966, Report of the Legal Sub-Committee, p. 13, Article VI.

⁹ See this author's article, *loc. cit.*, p. 382.

¹⁰ U.N. Doc. A/Ac. 105/35, 16 September 1966, Report of the Legal Sub-Committee, p. 14.

Geneva.¹ India suggested that the word 'absolutely' should be substituted for the word 'internationally'; however, this suggestion was not adopted.² The whole question of liability for damages is so complex that there is likely to be a separate agreement on the question in the near future.³

Article VIII. The novel element in this Article is contained in the provision that ownership will be retained by a State over objects launched into outer space, 'including objects landed or constructed on a celestial body'. This term was not included in paragraph 7 of the 1963 Resolution. The point was first raised by the American delegate in a letter to the Chairman of the Committee on the Peaceful Uses of Outer Space. In the letter it was suggested that 'ownership of objects landed, constructed or used on a celestial body should be retained by the launching State'.⁴ Concerning jurisdiction, it was also stated in the same letter that 'a launching State should be entitled to exercise authority over its facilities on a celestial body and persons participating in its activities there'.⁵ These statements were incorporated in Article 7 of the American Draft Treaty⁶ and the substance of the statement concerning ownership of objects on celestial bodies was adopted in the final text of Article VIII. The remaining provisions of Article VIII concerning jurisdiction and ownership simply repeat the terms of the 1963 Resolution.

Article IX. This Article governing 'nuisance' in outer space again reflects the language and substance of paragraph 6 of the 1963 Resolution. A new sentence has been introduced. 'States parties to the Treaty shall pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose.' Both Draft Treaties included a provision to regulate activities likely to cause a nuisance, although the Russian proposal was much more detailed.⁷ It is interesting to note the statement of the Russian delegate that 'the provision of information concerning the potentially harmful effects of an activity or experiment must certainly be compulsory, and that was what Article VIII stipulated'.⁸

Article X. This Article was perhaps the most difficult of all on which to reach agreement. The Russian delegate adopted the view that if a State granted tracking facilities to one State then it would be legally obliged to grant the same facilities, upon request, to another State. The American delegate opposed this view and emphasized that it was for each State to decide voluntarily whether to grant or withhold such facilities. The latter view seems to have prevailed, although it was made incumbent on a State 'to consider on a basis of equality any requests by other States . . .'.

The point was first mentioned in Article 1 of the American Draft Treaty which stated that 'the parties to the Treaty undertake to accord equal conditions to States engaged in the exploration of outer space'.⁹ The reason for Russian emphasis on this

¹ U.N. Doc. A/Ac. 105/35, 16 September 1966, Report of the Legal Sub-Committee, Annex II, p. 3.

² Ibid., Annex III, p. 10. See also U.N. Doc. A/Ac. 105/C. 2/SR 67, 21 October 1966, Legal Sub-Committee, p. 10.

³ U.N. Doc. A/Ac. 105/C. 2/SR 57, 20 October 1966, Legal Sub-Committee, p. 8.

⁴ U.N. Doc. A/Ac. 105/35, 16 September 1966, Report of the Legal Sub-Committee, p. 4.

⁵ Ibid.

⁶ Ibid., p. 7.

⁷ Ibid., p. 8 (Article 10 of the American Draft Treaty) and p. 14 (Article VIII of the Russian Draft Treaty). Agreement on this Article was also reached at Geneva, *ibid.*, Annex II, p. 10.

⁸ U.N. Doc. A/Ac. 105/C. 2/SR 68, 5 August 1966, Legal Sub-Committee, p. 5.

⁹ U.N. Doc. A/Ac. 105/35, 16 September 1966, Report of the Legal Sub-Committee, p. 12 and *ibid.*, Annex III, p. 12 and Annex IV, p. 2.

point, as the Russian delegate explained, was that 'the United States . . . it must be noted . . . had concluded agreements with twenty-three countries enabling it to track with complete safety the objects it had launched into space'.¹

Article XI. Although in Article X the Russian delegation advocated that the provision of information should be mandatory, in relation to Article XI it took the view that the information to be given to the Secretary-General should be on a voluntary basis.² The United States, on the other hand, took the view that the furnishing of such information should be mandatory.³ The final text requires States 'to inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of the nature, conduct, locations and results of such activities'.

Article XII. This Article, concerning inspection, was also controversial. Both America and Russia favoured freedom of access to installations. America favoured freedom of access 'at all times'.⁴ The Russian delegate, however, wished to impose two limitations; that it should be given 'on the basis of reciprocity' and that reasonable advance notice of a visit should be given. In the final Article both the Russian restrictions were accepted. Although there was much discussion concerning the precise meaning of 'on the basis of reciprocity' there can be no doubt that the inclusion of such a term severely weakens the treaty.⁵

Article XIII. This Article, concerning the extent to which the provisions of the Treaty are to be binding with respect to outer-space activities of international organizations, gave rise to some discussion. Article VI of the Russian Draft Treaty, reproducing the terms of paragraph 5 of the Resolution, would have provided that 'when activities are carried on in outer space by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States parties to the Treaty participating in such organization'. The Article, as adopted, deals with the matter rather more obliquely and an additional Article on international organizations, proposed by Great Britain, was rejected.⁶

Articles XIV–XVII: The Final Articles. These Articles stipulate that the Treaty is to be open to all States for signature, that the United States, Russia and the United Kingdom are to be the depositary powers and that five ratifications (including the Depositary Governments') are required for it to enter into force. Provision is also made for amendments in Article XV and withdrawal in Article XVI.

Conclusion. An assessment of the advantages and defects of the Treaty has already been given. It may be suggested that on the whole the former outweigh the latter. In conclusion one may note that the Legal Sub-Committee is now to direct its attention to 'defining outer space' and preparing two agreements;⁷ one on liability and one concerning assistance to astronauts and the return of space vehicles. An international conference on the exploration and peaceful uses of outer space has also been arranged to take place in Vienna in September 1967.

¹ U.N. Doc. A/Ac. 105/C 2/SR 73, 19 October 1966, Legal Sub-Committee, p. 6.

² U.N. Doc. A/Ac. 105/53, 16 September 1966, Report of the Legal Sub-Committee, p. 7 (American Draft Treaty, Article 4), Annex III, pp. 3 and 5, Annex IV, pp. 4 and 6.

³ U.N. Doc. A/Ac. 105/C 2/SR 70, 21 October 1966, Legal Sub-Committee, pp. 2, 5, 11.

⁴ *Ibid.*, p. 7, Article VI.

⁵ Compare with Article VII of the Antarctica Treaty. See U.N. Doc. A/Ac. 105/C. 2/SR 63, 20 October 1966, Legal Sub-Committee, pp. 4, 6 and 9.

⁶ U.N. Doc. A/Ac. 105/35, 16 September 1966, Report of the Legal Sub-Committee, p. 13, and Annex III, p. 8.

⁷ U.N. Doc. A/6621, 17 December 1966, Report of the Committee on the Peaceful Uses of Outer Space, p. 11.

APPENDIX I

TREATY OF PRINCIPLES GOVERNING THE
ACTIVITIES OF STATES IN THE EXPLORATION AND
USE OF OUTER SPACE, INCLUDING THE MOON AND OTHER
CELESTIAL BODIES

The States Parties to this Treaty,

Inspired by the great prospects opening up before mankind as a result of man's entry into outer space,

Recognizing the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes,

Believing that the exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development,

Desiring to contribute to broad international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes,

Believing that such co-operation will contribute to the development of mutual understanding and to the strengthening of friendly relations between States and peoples,

Recalling Resolution 1962 (XVIII) entitled 'Declaration of Legal Principles Governing the Activities of States in the Exploration and use of Outer Space', which was adopted unanimously by the United Nations General Assembly on 13 December 1963,

Recalling Resolution 1884 (XVIII), calling upon States to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction or from installing such weapons on celestial bodies, which was adopted unanimously by the United Nations General Assembly on 17 October 1963,

Taking account of United Nations General Assembly Resolution 1110 (II) of 3 November 1947, which condemned propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace or act of aggression, and considering that the aforementioned resolution is applicable to outer space,

Convinced that a Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, will further the purposes and principles of the Charter of the United Nations,

Have agreed on the following:

Article I

The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.

There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation.

Article II

Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Article III

States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.

Article IV

States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

Article V

States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing, they shall be safely and promptly returned to the State of registry of their space vehicle.

In carrying on activities in outer space and on celestial bodies, the astronauts of one State Party shall render all possible assistance to the astronauts of other States Parties.

States Parties to the Treaty shall immediately inform the other States Parties to the Treaty or the Secretary-General of the United Nations of any phenomena they discover in outer space, including the moon and other celestial bodies, which could constitute a danger to the life or health of astronauts.

Article VI

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the State concerned. When activities are carried on in outer Space, including the moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization, and by the States Parties to the Treaty participating in such organization.

Article VII

Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the earth, in air space or in outer space, including the moon and other celestial bodies.

Article VIII

A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the earth. Such objects or component parts found beyond the limits of the State Party to the Treaty on whose registry they are carried shall be returned to that State, which shall, upon request, furnish identifying data prior to their return.

Article IX

In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the moon and other celestial bodies, may request consultation concerning the activity or experiment.

Article X

In order to promote international co-operation in the exploration and use of outer space, including the moon and other celestial bodies, in conformity with the purposes of this Treaty, the States Parties to the Treaty shall consider on a basis of equality any requests by other States Parties to the Treaty to be afforded an opportunity to observe the flight of space objects launched by those States.

The nature of such an opportunity for observation and the conditions under which it could be afforded shall be determined by agreement between the States concerned.

Article XI

In order to promote international co-operation in the peaceful exploration and use of outer space, States Parties to the Treaty conducting activities in outer space, including the moon and other celestial bodies, agree to inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of the nature, conduct, locations and results of such activities. On receiving the said information, the Secretary-General of the United Nations should be prepared to disseminate it immediately and effectively.

Article XII

All stations, installations, equipment and space vehicles on the moon and other celestial bodies shall be open to representatives of other States Parties to the Treaty on a basis of reciprocity. Such representatives shall give reasonable advance notice of a projected visit, in order that appropriate consultations may be held and that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility to be visited.

Article XIII

The provisions of this Treaty shall apply to the activities of States Parties to the Treaty in the exploration and use of outer space, including the moon and other celestial bodies, whether such activities are carried on by a single State Party to the Treaty or jointly with other States, including cases where they are carried on within the framework of international inter-governmental organizations.

Any practical questions arising in connexion with activities carried on by international inter-governmental organizations in the exploration and use of outer space, including the moon and other celestial bodies, shall be resolved by the States Parties to the Treaty either with the appropriate international organization or with one or more States members of that international organization, which are Parties to this Treaty.

Article XIV

1. This Treaty shall be open to all States for signature. Any State which does not sign this Treaty before its entry into force in accordance with paragraph 3 of this article may accede to it at any time.

2. This Treaty shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America, which are hereby designated the Depositary Governments.

3. This Treaty shall enter into force upon the deposit of instruments of ratification by five Governments including the Governments designated as Depositary Governments under this Treaty.

4. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Treaty, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification of and accession to this Treaty, the date of its entry into force and other notices.

6. This Treaty shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.

Article XV

Any State Party to the Treaty may propose amendments to this Treaty. Amendments shall enter into force for each State Party to the Treaty accepting the amendments upon their acceptance by a majority of the States Parties to the Treaty and thereafter for each remaining State Party to the Treaty on the date of acceptance by it.

Article XVI

Any State Party to the Treaty may give notice of its withdrawal from the Treaty one year after its entry into force by written notification to the Depositary Governments. Such withdrawal shall take effect one year from the date of receipt of this notification.

Article XVII

This Treaty, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the depositary Governments. Duly certified copies of this Treaty shall be transmitted by the depositary Governments to the Governments of the signatory and acceding States.

IN WITNESS WHEREOF the undersigned, duly authorized, have signed this Treaty.

DONE in, at the cities of London, Moscow and Washington, the day of one thousand nine hundred and

APPENDIX II

DECLARATION OF LEGAL PRINCIPLES GOVERNING THE ACTIVITIES OF STATES IN THE EXPLORATION AND USE OF OUTER SPACE

Unanimously adopted by the General Assembly of the United Nations on 13 December 1963¹

The General Assembly

Inspired by the great prospects opening up before mankind as a result of man's entry into outer space,

Recognizing the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes,

Believing that the exploration and use of outer space should be carried on for the betterment of mankind and for the benefit of States irrespective of their degree of economic or scientific development,

Desiring to contribute to broad international co-operation in the scientific as well as in the legal aspects of exploration and use of outer space for peaceful purposes,

Believing that such co-operation will contribute to the development of mutual understanding and to the strengthening of friendly relations between nations and peoples,

Recalling its Resolution 1110 (II) of 3 November 1947, which condemned propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression, and considering that the aforementioned resolution is applicable to outer space,

Taking into consideration its Resolutions 1721 (XVI) of 20 December 1961 and 1802 (XVII) of 14 December 1962, adopted unanimously by the States Members of the United Nations,

¹ Resolution 1962 (XVIII).

Solemnly declares that in the exploration and use of outer space States should be guided by the following principles:

1. The exploration and use of outer space shall be carried on for the benefit and in the interests of all mankind.

2. Outer space and celestial bodies are free for exploration and use by all States on a basis of equality and in accordance with international law.

3. Outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

4. The activities of States in the exploration and use of outer space shall be carried on in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.

5. States bear international responsibility for national activities in outer space, whether carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried on in conformity with the principles set forth in the present Declaration. The activities of non-governmental entities in outer space shall require authorisation and continuing supervision by the State concerned. When activities are carried on in outer space by an international organisation, responsibility for compliance with the principles set forth in this Declaration shall be borne by the international organisation and by the States participating in it.

6. In the exploration and use of outer space, States shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space with due regard for the corresponding interests of other States. If a State has reason to believe that an outer space activity or experiment planned by it or its nationals would cause potentially harmful interference with activities of other States in the peaceful exploration and use of outer space, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State which has reason to believe that an outer space activity or experiment planned by another State would cause potentially harmful interference with activities in the peaceful exploration and use of outer space may request consultation concerning the activity or experiment.

7. The State on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and any personnel thereon, while in outer space. Ownership of objects launched into outer space, and of their component parts, is not affected by their passage through outer space or by their return to the Earth. Such objects or component parts found beyond the limits of the State of registry shall be returned to that State, which shall furnish identifying data upon request prior to return.

8. Each State which launches or procures the launching of an object into outer space, and each State from whose territory or facility an object is launched, is internationally liable for damage to a foreign State or to its natural or juridical persons by such object or its component parts on the Earth, in air space, or in outer space.

9. States shall regard astronauts as envoys of mankind in outer space, and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of a foreign State or on the high seas. Astronauts who make such a landing shall be safely and promptly returned to the State of registry of their space vehicle.

DECISIONS OF BRITISH COURTS DURING 1965–1966 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. PUBLIC INTERNATIONAL LAW*

Jurisdiction—territorial operation of legislation

Case No. 1. *Draper v. Turner*, [1965] 1 Q.B. 424, C.A. Section 2 (2) of the Fertilizers and Feeding Stuffs Act, 1926, provides:

‘On the sale for use as food for cattle or poultry of an article included in the first column of Sch. 1 or Sch. 2 to this Act there shall be implied, notwithstanding any contract or notice to the contrary, a warranty by the seller that the article is suitable to be used as such, and does not, except as otherwise expressly stated in the statutory statement, contain any ingredient included in Sch. 3 to this Act.’

In this action the plaintiffs were farmers whose cattle had been poisoned by cattle food contaminated with castor bean seed. The defendants were merchants and various suppliers who had dealt with the cattle cake. The fourth parties, hereinafter the ‘buyers’, were seeking to pass liability on to the fifth parties, hereinafter the ‘sellers’.

The buyers were trying to obtain the benefit of the implied warranty in the provision set out above. The sellers had sold the cattle cake on c.i.f. terms and, when the contract was made, the vessel in which the goods had to be shipped had not left Burma. While the goods were in transit some were sold, the property in these passing on transfer of the bill of lading before the vessel reached port at Liverpool.

The Court of Appeal held that Section 2 (2) of the Fertilizers and Feeding Stuffs Act, 1926 applied only to ‘sales which took place within the United Kingdom’, sales referring to the sale itself, the transfer of property in the goods. The transfer of property had taken place long before the ship reached Liverpool and the buyers could not benefit from the statutory warranty. Lord Denning M.R.¹ referred to ‘the general rule that an Act of Parliament only applies to transactions within the United Kingdom and not to transactions outside.’ Diplock L. J.² observed:

‘*Prima facie* an Act of the United Kingdom Parliament, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom (*A.-G. of the Province of Alberta v. Huggard Assets, Ltd. and A.-G. of Canada*)³. . . . An examination of the detailed provisions of the Act of 1926, so far from rebutting the presumption that it is intended to apply only to sales which take place in the United Kingdom, seems to me to reinforce it.’ In making an examination of its provisions, Diplock L.J. remarked that the Act imposed criminal liabilities which are closely linked with the civil liabilities arising on a sale and then observed: ‘It cannot be supposed, in the absence of very clear words to the contrary, that Parliament intended to create criminal liability for acts or omissions which take place abroad.’ Danckwerts L.J. agreed with the judgments of Lord Denning M.R. and Diplock L.J.

The statements of the relevant principle of statutory interpretation are of general interest since such rules of municipal law are a source of the principle of international

* © Dr. Ian Brownlie, 1967.

¹ At p. 432.

² At p. 435.

³ [1953] A.C. 420 at p. 441.

law that a State cannot legislate in respect of matters outside its jurisdiction.¹ The presumption that the effect of a United Kingdom statute is territorial may be non-existent in certain spheres, for example, the guardianship of infants: see *In re P. (G.E.) (An Infant)*² and *Re Dulles' Settlement*, [1951] Ch. 265.³ The increase in the instances in which enforcement jurisdiction is exercisable in respect of matters outside the United Kingdom⁴ may well have an influence on the readiness of the courts to set aside the presumption, which still exists in many spheres, that legislative competence or jurisdiction is territorially limited.

Jurisdiction—protection of alien infants

Case No. 2. In re P. (G.E.) (An Infant), [1965] 2 W.L.R. 1, C.A. This interesting case raised the issue of the jurisdiction of the relevant English court in the matter of protecting a stateless infant. The background of the infant involved was as follows. His father was born in Jerusalem when it was part of the Ottoman Empire. The grandfather was a White Russian and the grandmother stateless. When the grandparents moved to Egypt the father became stateless and was still stateless when he left Egypt. He married the mother in Egypt in 1954. She had been born in Egypt and had an Egyptian father. Both father and mother were Jewish and were married in accordance with Rabbinic law. The infant was born in Egypt early in 1956 and after the Suez crisis his parents brought the infant to England. The wife renounced her Egyptian nationality in order to obtain an exit visa. In 1962 the parents established a matrimonial home in Brighton and both made applications for naturalization as British subjects which were not in fact proceeded with. Later in 1962 after the mother had left the matrimonial home, the father took the son to Israel, where they both remained and subsequently acquired Israeli nationality.

On 4 January 1963 the mother issued a summons under the Law Reform (Miscellaneous Provisions) Act, 1949, and the Guardianship of Infants Acts, 1886 and 1925, seeking, *inter alia*, to make the infant a ward of court. The father entered appearance under protest and took out a summons to have the proceedings set aside for want of jurisdiction. There was evidence that when the father went to Israel he, being stateless, was furnished with a travel document for himself and his son of the kind issued pursuant to the Convention relating to the Status of Stateless Persons, 1954.⁵ This document gave the holder an absolute right of re-entry to the United Kingdom within not less than three months.

Plowman J.⁶ held that the court had no jurisdiction in wardship proceedings over an alien infant not physically present within the jurisdiction. The Court of Appeal unanimously allowed the appeal by the mother. The issue was the extent of the jurisdiction of the Crown as *parens patriae*, exercised by the Court of Chancery. The relevant Statutes provided no definition of jurisdiction for this purpose and the matter was thus one of principle. The Court of Appeal declined to employ

¹ See generally, on the territoriality of jurisdiction and the modern qualifications and elaborations of the principle, F. A. Mann, *Recueil des cours*, 111 (1964-I), pp. 9-162.

² See Case No. 2, below.

³ Cf. the Exchange Control Act, 1947, the Strategic Goods (Control) Order, 1959, and the Emergency Laws (Re-enactments and Repeals) Act, 1964, section 3.

⁴ See Glanville Williams, 'Venue and the Ambit of Criminal Law', *Law Quarterly Review*, 81 (1965), pp. 276-88, 395-421, 518-38. The courts in the United Kingdom have on occasion shown a readiness to adopt the security principle in matters of jurisdiction, as in *Naim Molvan v. A.-G. for Palestine*, [1948] A.C. 531, P.C.

⁵ Cmd. 9509, Article 28.

⁶ [1964] Ch. 575.

the test of domicile since the tests of domicile gave unsatisfactory results. Lord Denning M.R. based jurisdiction on the test of allegiance. In his words:¹ 'An alien who comes here, whether adult or babe in arms, owes *allegiance* to the Crown from the moment he comes within the realm. So long as he is here, or is *ordinarily resident* here, he owes allegiance to the Crown and correspondingly comes under its protection. He cannot throw off his allegiance simply by departing from the country.' Lord Denning referred to the law of treason for support and cited *Joyce v. Director of Public Prosecutions*.² In the present case the father owed allegiance because he had left his wife here and had left the country with a travel document valid for at least three months. 'As for the child', said Lord Denning,³ 'he clearly had a call on the protection of the Crown, because he was too young to protect himself. He had a right to the protection of the Crown by reason of having his mother here and his home here. And he, too, had a travel document entitling him to return within three months.' In the following passages his Lordship equates the principle of allegiance with the test of ordinary residence.

Pearson L.J. also approached the matter through the principle of allegiance. He observed⁴ that an infant of foreign nationality owes a duty of allegiance to the Sovereign and is entitled to protection 'if he is in some sense in this country'. In his view there were two classes of case. Temporary residence created a local allegiance although it would seldom be proper to exercise jurisdiction in such a case. As to the second class of case Pearson L.J. expressed himself as follows:

'(b) Suppose, however, that the infant is, at the time when the relevant proceedings are instituted, ordinarily resident in this country, but temporarily present in some foreign country. He may be there on holiday, or accompanying his father on a business trip, or he may have been "kidnapped" from this country and taken to a foreign country. "Kidnapping" may include any case of a child being taken out of this country by some person against the wishes of the parents, or by one parent against the wishes of the other parent, at any rate where some element of force or deception or secrecy is involved. In my judgment, there must be jurisdiction in such cases for several reasons. First, justice and convenience require it. It would be absurd and unjust if the wronged parents or parent were prevented from obtaining relief in the English court by the accident of the child being abroad on holiday at a particular date or by the wrongful act of "kidnapping". Secondly, there is support in the authorities for residence conferring jurisdiction: *Johnstone v. Beattie*, per Lord Campbell;⁵ *Brown v. Collins*, per Kay, J.,⁶ and *Re Bourgoise*, per Cotton, L.J.⁷ Thirdly, *Joyce v. Director of Public Prosecutions*⁸ shows that an alien resident in this country does not necessarily free himself from his allegiance by the mere act of departure from this country. He may continue to owe allegiance because he has left his family and property in this country under the protection of the Crown, or because he has applied for and obtained a British passport, or because his "residence" may not cease immediately on his quitting the country.'⁹

Applying these principles to the present case, Pearson L.J. decided that, at the date of the institution of the relevant proceedings, more than seven weeks after father and son arrived in Israel, the ordinary residence of the father and son in England had not been terminated. In so deciding he emphasized that the father at that date may not have been able to make up his mind firmly, and referred to the existence of the travel document giving permission to the holder to return to England. The learned judge also

¹ At p. 9. ² [1946] 1 All E.R. 186; [1946] A.C. 347. ³ At p. 10. ⁴ At p. 12.

⁵ (1843), 10 Cl. & Fin. 42 at p. 120.

⁶ (1883), 25 Ch.D. at p. 62.

⁷ (1889), 41 Ch.D. 310 at p. 319.

⁸ [1946] 1 All E.R. 186; [1946] A.C. 347.

⁹ [1946] 1 All E.R. at pp. 189, 190; [1946] A.C. at pp. 366-9.

touched on the influence of the father's actions on the ordinary residence of the son and observed that: 'The ordinary residence of the son while in the father's charge would naturally tend to be the same as that of the father, but is not necessarily at all times the same.' Russell L.J. adopted a very similar approach. He referred to the law of treason and gave weight to the travel document which gave an absolute right of re-entry to the United Kingdom.

This decision has considerable interest. The Court gave prominence to the concept of 'ordinary residence' but in fact revealed this concept as one of some refinement. Thus it was applied to somewhat complicated facts on the basis virtually of a presumption of continuance. Moreover, the concept was reinforced by or translated into the volatile principle of allegiance as applied in the much criticized decision in *Joyce v. Director of Public Prosecutions*.¹ Leaving aside the application of principle to fact, the principles propounded in the Court of Appeal are sensible enough. Much support now exists for employing a test of substantial connection in matters of jurisdiction² and the principle of ordinary residence reinforced by the notion of allegiance is an expression, in conventional English judicial usage, of the principle of substantial connection. This approach to jurisdiction for the protection of infants was supported by certain of the judges in the *Guardianship* case before the International Court.³ The analogy with the test for nationality on the international plane supported in the *Nottebohm* case⁴ is obvious enough but the parallel does not end there. In *Nottebohm* the *de cuius* had at the time of the proceedings lost all his connections with Guatemala and was established in Liechtenstein. In the present case, even at the date of the summons issued by the mother, the father had almost certainly opted for permanent settlement in Israel. The Court of Appeal was well aware that at the time of the appeal the child had been in Israel for two years and that whether jurisdiction *should* be exercised in the circumstances was a wholly different matter.⁵

Sovereign immunity—validity of law of a foreign sovereign State within its own territory

Case No. 3. Buck v. Attorney-General, [1965] Ch. 745, C.A. This case arose in the context of the attainment of independence by Sierra Leone. Sierra Leone before independence consisted of a Crown colony, to which the British Settlements Act, 1887, applied and the Sierra Leone Protectorate, the hinterland of the colony, to which the Foreign Jurisdiction Act, 1890, applied. On 27 April 1961, by virtue of the Sierra Leone Independence Act passed on 28 March 1961, the colony and protectorate were combined in an independent State within the Commonwealth. The constitution of the new State was provided for by the Sierra Leone (Constitution) Order in Council made on 14 April 1961, and to come into operation immediately before the coming into effect of the Independence Act.

The plaintiffs were citizens of Sierra Leone and British subjects, domiciled in the territory of the former colony, and they claimed to represent the descendants of settled freed slaves. They brought an action praying for declarations, and the essence of the prayer was that the Crown Colony still subsisted, as the Sierra Leone (Constitution) Order in Council, 1961, was *ultra vires* in so far as it applied, or purported to

¹ [1946] A.C. 347.

² See Mann, *Recueil des cours*, 111 (1964-I), pp. 43-51, 82-126; Sarkar, *International and Comparative Law Quarterly*, 11 (1962), pp. 466-70; and Fawcett, this *Year Book*, 38 (1962), pp. 188-90.

³ *I.C.J. Reports*, 1958, p. 109 (Judge Moreno Quintana); pp. 135-6 (Judge Winiarski); p. 145 (Judge Córdova); and p. 155 (Judge *ad hoc* Offerhaus).

⁴ *Nottebohm case (Second Phase)*, *I.C.J. Reports*, 1955, p. 4.

⁵ Lord Denning M.R. at p. 11; Pearson L.J. at p. 15; Russell L.J. at p. 18.

apply, to the colony. The *ultra vires* point rested on the effect of the British Settlements Act, 1887, as the exclusive basis for the powers vested in the Crown in relation to a settled colony. To found the jurisdiction of the Court to make the declarations sought, the plaintiffs pointed to the creation of the Constitution by an Order in Council which came into force separately from the Independence Act and for a moment of time before Sierra Leone became an independent sovereign State. The plaintiffs also pointed out that a declaration of invalidity would not be ineffective since by cutting off the powers of the putative Government of Sierra Leone at their source it would compel that Government, in practice, to take steps by legislation to rectify the position, which legislation could be opposed or influenced by the plaintiffs and their supporters.

Before Wilberforce J. the plaintiffs failed on the basis that the contentions advanced lacked substance. The plaintiffs appealed and the Court of Appeal dismissed the appeal primarily on the basis that the English courts had no jurisdiction to grant a declaration of the kind claimed. Harman L.J. stated his view on the matter of jurisdiction thus:¹

'These courts cannot, in my view, make a declaration impugning the validity of the constitution of a foreign or independent State, at any rate where that is the object of the action. This may be put as a matter of international comity, or upon the ground of effectiveness. No relief effective in this country or anywhere else is sought by the action. Any declaration which the court might make may be ignored with impunity by the independent country into whose affairs it pretends to pry, and I am of opinion that it would be not only improper, but contrary to law in those circumstances to make such a declaration as is here sought. Even if, however, I thought that we could, I should still think that we should not make such a declaration which would amount to an unwarrantable interference in the affairs of an independent member of the British Commonwealth.'

Diplock L.J.² made the following valuable survey of the issues:

'The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign State, in fact, the basic law containing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction, as, for instance, the validity of a foreign law might come in question incidentally in an action upon a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is about nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction.

'As a member of the family of nations, the Government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity, *videlicet* the accepted rules of mutual conduct as between State and State which each State adopts in relation to other States and expects other States to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent State, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law. One of the commonest applications of this rule by the judicial branch of the United Kingdom Government is the well-known doctrine of sovereign immunity. A foreign State cannot be impleaded in the English courts without its consent: see *Duff Development Co. v. Kelantan Government*.³ As was made clear in *Rahimtoola v. Nizam of Hyderabad*,⁴ the application of the doctrine of sovereign immunity does not depend upon the persons between whom the issue is joined, but upon the subject-matter of the issue. For the English court to pronounce upon the validity of a law of a foreign sovereign State within its own territory, so that the validity of that law became the *res* of the *res judicata* in the suit, would be to assert jurisdiction over the internal affairs of that State. That would be a breach of the rules of comity. In my view, this court has no jurisdiction so to do.

¹ At p. 768.

² At pp. 770-2.

³ [1924] A.C. 797, 820; 40 T.L.R. 566, H.L.

⁴ [1958] A.C. 379; [1957] 3 W.L.R. 884; [1957] 3 All E.R. 441, H.L.

'I do not think that this rule, which deprives the court of jurisdiction over the subject-matter of this appeal because assumption of such jurisdiction would involve an assertion of jurisdiction over the internal affairs of a foreign sovereign State, can be eluded by the device of making the Attorney-General of England a party instead of the Government of Sierra Leone. Mr. Gardner, for the plaintiffs, concedes (as he is bound to) that no declaration made in this action could create *res judicata* binding upon the Government of Sierra Leone. In so far as a declaration is sought as to the validity of the constitution of Sierra Leone, the Attorney-General of England, representing the United Kingdom Government, has no interest in the subject-matter of the issue. Even apart from the comity rule, the court has no jurisdiction to give a declaratory judgment in a suit against a party who has no interest in the subject-matter of the declaration. In such a case there is no *lis* between the parties for adjudication. There could be no judgment but only an advisory opinion, and this court has no jurisdiction to give advisory opinions.

'Mr. Gardner urges, however, that there was a moment of time when the Order in Council purported to be in force before Sierra Leone became an independent sovereign state, while the Government of the United Kingdom was still the sovereign government of the colony of Sierra Leone. He submits that, during that period, the English court would have had jurisdiction to declare the Order in Council to be *ultra vires*, and that it does not lose that jurisdiction merely because Sierra Leone has subsequently become a foreign state.

'I should in any event reject this argument. In applying the rule of comity, one looks to the substance of the issue, not to its form. The Order in Council was, on the face of it, intended to provide the constitution not of the colony of Sierra Leone, but of the new independent foreign state. The issue as to the validity of the Order in Council was thus, in substance, at the date of the writ, an issue as to the validity of the constitution of an independent sovereign state. But there is, I think, a technical answer also. As soon as Sierra Leone became independent, the Order in Council ceased to have any effect as an Order in Council, that is, as an exercise of the sovereign power of the United Kingdom Government represented by the Attorney-General of England. Whatever effect it then had was as part of the law of a foreign sovereign state, into the validity of which this court has no jurisdiction to inquire. Whether it was valid during the *punctum temporis* during which it was in force before Sierra Leone became independent is a subject-matter in which the parties have no interest. No legal rights or liabilities can depend upon it, except in so far as, the instant afterwards, it became part of the law of the independent sovereign state of Sierra Leone, into the validity of which we have no jurisdiction to inquire. The claim that the court has jurisdiction to make a declaration limited to the validity of the Order in Council, therefore, also fails on the ground that the parties at the time of suit had no interest in its subject-matter.'

Russell L.J.¹ dealt with the matter shortly:

'As to jurisdiction, I agree that the courts in this country have no jurisdiction to pronounce by declaration upon the validity of the constitution of an independent sovereign State when that declaration is all that is sought and no ancillary rights justiciable in these courts depend upon such a declaration. The proper and only forum in such circumstances is to be found in the courts of that independent sovereign State.'

It will be recalled that similar but not identical issues presented themselves to the International Court of Justice in the *Northern Cameroons* case (*Preliminary Objections*).² In the present case the judges treated the question as one of jurisdiction in form, but in substance it was a matter of admissibility or justiciability rather than of inherent jurisdiction. The preferable category would seem to be justiciability: there was substantially nothing an English court could do with respect to the relief asked for. Diplock L.J. makes the point with clarity when he says that any declaratory judgment

¹ At pp. 773-4.

² *I.C.J. Reports*, 1963, p. 15.

would be against the Attorney-General of England, a party who had no interest in the subject-matter of the declaration. Diplock L.J. is not cautious enough, however, when he states that the English court has no 'jurisdiction' to pronounce upon the validity of a law of a foreign sovereign State within its own territory, so that the validity of that law became the *res* of the *res judicata* in the suit. Harman L.J. put the matter more narrowly when he pointed out that the actual object of the plaintiffs was to impugn the validity of the constitution of another State. There are, of course, cases in which English courts have in effect passed on the validity of rules of foreign legal systems.¹ The difference between those cases and the present case cannot be explained by reference to what is part of the *res judicata* or to matters which are or are not 'incidental', since these factors are only a minor part of the indications relevant to the main issue, which is that of justiciability, the absence of a genuine *lis*. Another way of looking at the matter is to inquire: which is the appropriate forum? This is the point taken by Russell L.J. in the passage already quoted. In *Banco Nacional de Cuba v. Sabbatino*² the United States Supreme Court adopted a version of the Act of State doctrine according to which the issues between the American and Cuban Governments were to remain matter for negotiation between the two governments untrammelled by the pronouncements of a municipal court.

Immunity of State-owned vessels—execution of bail bond

Case No. 4. The Bulgaria, [1964] 2 Lloyd's Rep. 524, Admiralty Division. This application was in an Admiralty action *in rem* arising out of a collision. The defendants' vessel, *The Bulgaria*, was arrested on 14 October 1964, and on 20 October the defendants entered a conditional appearance, which did not amount to a submission to the jurisdiction of the Court. The point of interest arose as follows. The defendants intended to claim that the writ should be set aside on the ground that *The Bulgaria* was owned by a foreign sovereign, the Government of Bulgaria. The defendants desired that the vessel should sail before the Court was moved to set aside the writ. Consequently they were prepared to procure the execution of a bail bond as a condition of the release of the ship from arrest. Their concern was that, if the bond was in its usual form, its execution might be construed as a step in the action, amounting to a submission to the jurisdiction. The defendants applied for leave to file the bond with the following words added to the standard form:

'This bail is put up without prejudice to the right of the owners of *The Bulgaria* to move the Court to set aside the writ in the action on the grounds that the ship is the property of the Government of a recognized foreign sovereign State and that the said State declines to sanction the institution of these proceedings in this Court.'

Sir Jocelyn Simon P. gave the leave asked for on the basis that the effect of giving bail unconditionally on a claim to immunity was not a matter free from doubt. The

¹ In controversial cases involving perhaps the *grundnorm* of a system, the Foreign Office certificate takes the issue out of the hands of the court. In *Carl Zeiss Stiftung v. Rayner and Keeler Ltd.* (No. 2), [1966] 3 W.L.R. 125, the House of Lords, on its own premises, passed on the validity of the rules of a whole law district, the German Democratic Republic, in terms of a Soviet *grundnorm*. The whole system for proof of foreign law in the English courts may involve a close inquiry into foreign law: see *In re the Duke of Wellington*, [1947] Ch. 506. So also in the matter of recognition of foreign judgments. Similarly the application of the principle of sovereign immunity may entail close inquiry into the law of a State including in some cases the constitutional status of public corporations and constituent territorial units. Cf. Fawcett, *The British Commonwealth in International Law*, pp. 128-9. See also *Re Amand*, [1941] 2 K.B. 239 and [1942] 1 All E.R. 236 and F. A. Mann, *Law Quarterly Review*, 59 (1943), pp. 155-71.

² 84 Sup. Ct. 923 (1964).

element of doubt cannot be very significant if the principle that there must be an unmistakable election to submit to the jurisdiction be applied to the giving of bail. The English Courts do not presume such election very readily: see *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797; and *The Jassy*, [1906] P. 270.

Diplomatic immunity—Immunity from legal process—removal of immunity by statute—effect on action which had been stayed but not dismissed

Case No. 5. Empson v. Smith, [1965] 3 W.L.R. 380, Court of Appeal [1965] 2 All E.R. 881. This decision involves a further illustration of the principle that diplomatic immunity is not immunity from legal liability but immunity from suit. In April 1963 the plaintiff's action for breach of a tenancy agreement was stayed on the ground of the defendant's immunity from suit, the defendant being a member of the administrative and technical staff of the Diplomatic Mission of Canada. In August 1964 the plaintiff applied for removal of the stay. On 1 October 1964 the Diplomatic Privileges Act, 1964,¹ came into operation. The Act² brought into force provisions of the Vienna Convention on Diplomatic Relations,³ Article 37 (2) of which stipulates that immunity from civil and administrative jurisdiction of members of the administrative and technical staff of the mission 'shall not extend to acts performed outside the course of their duties . . .' The plaintiff now appealed from an order, made subsequently, striking out the plaintiff's action on the ground that it had been null and void when commenced. The defendant's claim to immunity rested on the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952.⁴

The Court of Appeal approached the issue as to the effect of the change of law in the Diplomatic Privileges Act, 1964, by emphasizing that diplomatic agents are immune from suit and not from legal liability as such (reference was made to *Dickinson v. Del Solar*, [1930] 1 K.B. 376 at 380, *per* Lord Hewart C.J.). The immunity from suit could be lost by waiver and, in respect to acts done in a personal capacity, if the agent should cease to be *en poste* and a sufficient time had elapsed thereafter for him to wind up his affairs. On the latter point Diplock L.J. referred to *Magdalena Steam Navigation Co. v. Martin*;⁵ *Musurus Bey v. Gadban*;⁶ and *Zoernsch v. Waldock*.⁷ There was no reason in logic or the law of nations why the position should be different when the procedural bar was removed by statute (see especially Diplock L.J. quoted below). As a consequence the plaint was valid as no proceedings had been taken prior to the act of 1964 to set it aside or dismiss the action and the procedural bar no longer existed. The applications by the plaintiff for removal of the stay and by the defendant for dismissal of the action must go back to the county court for determination of the issue whether the acts of which the plaintiff complained were performed by the defendant outside the course of his duties.

The decision is clearly correct on the issue of principle,⁸ and it emphasizes the useful effect of the Diplomatic Privileges Act, 1964, in removing possible differences between the English rules on the subject and those of general international law. It appears that the courts will not be concerned to discover havens for diplomats in the Diplomatic Privileges Act, 1708, which are not expressly preserved in the Act of 1964. In the present case the defendant, relying on section 3 of the Act of 1708, had argued that

¹ 12 & 13 Eliz. II, c. 81.

² See Schedule 1.

³ In force 24 April 1964.

⁴ 15 & 16 Geo. VI and 1 Eliz. II, c. 18.

⁵ (1859), 2 E. & E. 94.

⁶ [1894] 2 Q.B. 352.

⁷ [1964] 1 W.L.R. 675; noted in this *Year Book*, 40 (1964), p. 372.

⁸ See generally *British Digest of International Law*, vol. 7, pp. 717 et seq.

Mrs. Empson's plaint was void *ab initio*. Diplock L.J. dealt with this argument in the following passage:¹

'The Act of 1708, whose history is entertainingly related by Lord Mansfield in *Triquet v. Bath*,² has been repeatedly held to be declaratory of the common law, and must therefore be construed according to the common law of which the law of nations must be deemed a part (see *Re Suarez*, per Swinfen Eady, L.J.).³ It is unnecessary to determine whether a plaint in a county court fell within the express provisions of s. 3 of the Act of 1708 or whether that section applies to a person in the situation of the defendant, for it was decided in *Re Suarez*⁴ that, notwithstanding the Act of 1708, a writ issued in the High Court against an ambassador was not void *ab initio*. If it were it would, indeed, be impossible for the privilege ever to be waived for, as was decided in *Kahan v. Federation of Pakistan*,⁵ there can be no effective waiver until the court is actually seised of the proceedings. The waiver is an undertaking given not to the other party to the proceedings but to the court itself. It can effectively be given only after the proceedings have commenced. *Kahan's* case⁵ was one of State immunity, but it is well settled that diplomatic immunity is governed by the same principles for it is claimed by the head of the mission on behalf of his State.'

Further on, speaking of the Act of 1964, Diplock L.J. emphasized that the Act 'gives statutory effect to an international convention by which sovereign states have mutually waived in part immunities for members of the staff of their foreign missions to which they were formerly entitled by the law of nations'.

IAN BROWNLIE

B. PRIVATE INTERNATIONAL LAW*

Service upon an absent defendant—place of breach of contract and commission of tort

Case No. 1. The decision of Winn J. in *Cordova Land Co. Ltd. v. Victor Brother Inc.*; *Cordova Land Co. Ltd. v. Black Diamond S.S. Corp.*⁶ raises several aspects of the operation of Order XI, r. 1, of the Rules of the Supreme Court which gives the court the power in certain circumstances to permit service of a writ or notice of a writ upon a defendant out of the jurisdiction. By contracts, made in the United States and the proper law of which was not English, vendors sold a quantity of skins c.i.f. to Hull. The skins were shipped from Boston to Hull on two ships and the masters gave clean bills of lading. On arrival in Hull both cargoes were found to be badly damaged. The buyers sought leave to give notice of two writs in America, one in an action against the vendors for alleged breach of contract, and the other in a tort action against the shipowners for alleged fraudulent misrepresentation by their masters in issuing clean bills of lading.

The learned judge held that there was no implied warranty in the contracts that the skins would be of contract description and quality on arrival at Hull and that accordingly there had been no breach within the jurisdiction so as to give him power to grant leave for service on the absent vendor defendant under Order XI, r. 1 (1) (g). What is interesting in this part of the judgment is Winn J.'s emphatic *obiter dictum* to the effect that even where there is power to allow such service:

'It is a discretion of the court which should be exercised with extreme caution and with full regard in every case to the circumstances.'⁷

Order XI, r. (1) (h) provides that leave may be granted to serve an absent defendant

¹ At p. 390.

² (1764), 3 Burr. 1478 at p. 1480.

³ [1918] 1 Ch. at p. 192.

⁴ [1918] 1 Ch. 176.

⁵ [1951] 2 K.B. 1003.

* © P. B. Carter, 1967.

⁶ [1966] 1 W.L.R. 793.

⁷ [1966] 1 W.L.R. 793, 796.

in a tort action 'if the action begun by the writ is founded on a tort committed within the jurisdiction'. Winn J. held that the alleged tort of the shipowner defendants had not been committed within the jurisdiction and that, therefore, he had no power to grant leave. He went on to say that, even if he had such a power, he would in his discretion not have exercised it as England was clearly not the *forum conveniens*.

The location of a tort is a problem which can arise in the context of choice of law.¹ All the significant English cases² on the subject have in fact, however, arisen in the context of Order XI, r. 1. These cases do not present an entirely consistent pattern. Winn J.'s contribution to the body of authority has two clear and, it is respectfully submitted, valuable characteristics.

First, it introduces an element of patent flexibility. The learned judge refrained from formulating any test couched in rigid terms of 'the place of the defendant's act', 'the place of the last event', or 'the place of the damage'. He accepted that the tort in the instant case was not complete until the representation had been relied upon and that it was not actionable until damage had resulted and that this may have occurred in England. 'But', he said, 'whether one is concentrating upon the moment when the tort becomes actionable or upon the moment when the tort is complete, it does not seem to me that either of those tests is the appropriate one when one is considering the proper effect to be given to the words "founded on a tort committed within the jurisdiction"'.³ Instead Winn J. sought to locate the *substance* of the allegedly tortious activity. He held that on the facts before him the alleged wrong had substantially been committed in Boston and that, therefore, there was no discretion to grant leave: 'I think that the main matter to which I ought to have regard in deciding whether or not there is jurisdiction by reason of paragraph (h) is that the substance of the wrongdoing occurred in the United States of America'.⁴

Secondly, great emphasis is placed upon the propriety of construing Order XI, r. 1, restrictively. Winn J. quoted with approval the words of Scott L.J. in *George Monro Ltd. v. American Cyanamid and Chemical Corporation*: 'Service out of the jurisdiction at the instance of our courts is necessarily *prima facie* an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected. I have known many continental lawyers of different nations in the past criticize very strongly our law about service out of the jurisdiction. As a matter of international comity it seems to me important to make sure that no such service shall be allowed unless it is clearly within both the letter and spirit of Order XI.'⁵

When the problem of locating a tort arises in relation to choice of law, cases decided in the context of Order XI, r. 1 have some force by way of analogy. Winn J.'s emphasis upon the desirability of looking to the substance of the alleged tort does not detract from the value of the analogy, provided allowance is made for two differences between the two situations. Firstly, whereas in the context of jurisdiction the question posed is simply as to whether the alleged tort was committed in England or elsewhere, in the context of choice of law the question is more precise for we must determine exactly where else it was committed if not in England. The need for specific location means that a lesser measure of 'substance' may sometimes have to suffice. Secondly, in the context of choice of law there is no *a priori* reason why an alleged tort may not be deemed to be committed in more than one place provided the connection with each is sufficiently great to warrant allowing the plaintiff to take advantage of the law of either.

¹ *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1.

² *Kroch v. Rossel et Cie.*, [1937] 1 All E.R. 725; *Monro v. American Cyanamid & Chemical Corpn.*, [1944] 1 K.B. 432; *Bata v. Bata*, [1948] W.M. 366.

³ [1966] 1 W.L.R. 793, 798.

⁴ [1966] 1 W.L.R. 793, 801.

⁵ [1944] K.B. 432, 437.

On the other hand, the learned judge's reference to the need to 'be not only within the letter but within the spirit of the order giving this powerful jurisdiction'¹ must, of course, in some measure reduce the significance of the jurisdiction cases in the choice of law context. A court's refusal to regard a tort as committed within the jurisdiction so as to warrant the granting of leave to serve an absent defendant will not necessarily preclude the application of English law as the *lex loci delicti* should the matter subsequently come for trial. An alleged tort may not be sufficiently connected with England to satisfy the stringent requirements of Order XI, r. 1, but may, nevertheless, be sufficiently so connected for English law to be the appropriate *lex causae*.

To admit of flexibility in determining the *locus delicti* for the purposes of choice of law would not, be it noted, be tantamount to a latent general acceptance of any notion of a 'proper law of the tort'. As is pointed out in Dr. Cheshire's treatise: 'In the great majority of cases the place of the tort is clear: it is only in the abnormal case that the suggested rule would apply. Moreover, its application would not involve consideration of matters such, for instance, as the domicile of the parties, to which significance is apparently ascribed by those who favour the proper law doctrine'.²

Mutation of type of marriage

Case No. 2. The decision of Cumming-Bruce J. in *Ali v. Ali*³ makes new law and provokes more questions than it answers. The facts were quite simple. Two Indians entered into a valid polygamous marriage in India in 1958. In 1961 they acquired domicile of choice in England. The learned judge held that he had jurisdiction to dissolve the initially polygamous marriage because it had been converted into a monogamous marriage by virtue of the change of domicile. 'The husband in this case carried into effect his intention of making England his country of domicile. Thereby he subjected himself to monogamy as a rule of his personal law and in my view this was as effective to convert a potentially polygamous marriage to a monogamous marriage as specific legislation (having the same intendment) would have been.'⁴ Although relief could not be granted in respect of matrimonial offences which occurred before the moment of mutation by change of domicile, it could be granted in respect of offences occurring subsequently.

Reliance is placed upon the case of *Cheni v. Cheni*.⁵ The decision in *Ali v. Ali* would seem, however, to go far beyond what was there decided. In *Cheni v. Cheni* Sir Jocelyn Simon P. recognized the mutation of a marriage upon the birth of a child. It is to be noted, however, that this change was in accord with the law governing the original nature of the marriage, the *lex loci celebrationis*. In *Ali v. Ali* a change of domicile seems to have been regarded as capable of depriving that law of continuing significance so far as the classification of the marriage is concerned. It is true that in *Cheni v. Cheni* the learned President did not emphasize the importance of the *lex loci celebrationis*. Moreover he did advert to the effect of change of domicile upon the nature of a marriage when he said: 'After all, there are no marriages which are not potentially polygamous, in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses.'⁶ This passage was cited by Cumming-Bruce J.⁷ In assessing its significance one ought, however, to remember that it was an *obiter dictum* and, moreover, one concerned with changes not from polygamy to monogamy

¹ [1966] 1 W.L.R. 793, 800.

² Cheshire, *Private International Law* (7th ed., 1965), p. 257.

³ [1966] 2 W.L.R. 620.

⁴ [1966] 2 W.L.R. 620, 631.

⁵ [1965] P. 85.

⁶ [1965] P. 85, 90.

⁷ [1966] 2 W.L.R. 620, 630.

but from monogamy to polygamy, the very possibility of which Sir Jocelyn Simon in fact seemed to discount.

The meaning of Cumming-Bruce J.'s reference to 'specific legislation' is not altogether clear. Legislation in the English forum, in the country of the earlier domicile or in the *locus celebrationis*? If the learned judge was referring to legislation in the country of celebration, his decision is, of course, much less far-reaching than would otherwise be the case. It seems unlikely, however, that this is what he intended, for earlier in his judgment¹ Cumming-Bruce J. confessed to great difficulty in following counsel's argument that any mutation must be valid according to the law of the place of celebration.

The learned judge also relies upon the case of *Ohochuku v. Ohochuku*.² This, it is submitted, is totally unwarranted. There a valid polygamous marriage had somewhat curiously been followed by a monogamous marriage between the same parties in an English Registry Office. Wrangham J. dissolved the English marriage but he specifically held that he had no jurisdiction to dissolve the earlier and subsisting polygamous marriage. Cumming-Bruce J.'s statement that 'the significance of the case is that it was recognized by Wrangham J. as a valid case of conversion of a potentially polygamous marriage into a monogamous marriage'³ simply is not borne out by the Reports. Wrangham J. said: 'In this court and for this purpose the Nigerian marriage must be regarded as a polygamous marriage over which this court does not exercise jurisdiction. I therefore pronounce a decree *nisi* for the dissolution not of the Nigerian marriage but of the marriage in London. I am told that, in fact, that will be effective by Nigerian law to dissolve the Nigerian marriage; but that forms no part of my judgment. That is for someone else to determine and not for me.'⁴

Had the principle apparently laid down in *Ali v. Ali* been applied in *Hyde v. Hyde*⁵ itself, that case would have been decided differently. This is in effect admitted by Cumming-Bruce J. but justified on the ground that: 'In 1866 the importance of domicile as affecting capacity to marry was only dimly appreciated and it has been during the succeeding century that jurisprudence has developed the doctrine to the full degree which it has now attained in English law.'⁶ Why it should be assumed that what had been decided by the House of Lords in 1861⁷ was only dimly appreciated in 1866 is not clear. Moreover, the relevance to capacity to marry of a change of domicile three years after the marriage (as was the fact in *Ali v. Ali*) is something that jurisprudence has never developed.

Viewed generally and generously the decision in *Ali v. Ali* may be welcomed as a mitigation of the rule in *Hyde v. Hyde*. On the other hand, the notion that parties can change the nature of their marriage by changing their domicile could give rise to hardship. Surely it is desirable that parties to a marriage should at the outset be able to ascertain by reference to what legal system the nature of their union will for ever be judged. So far as its polygamous or monogamous quality is concerned the reference is to the *lex loci celebrationis*. As a matter of principle the control of this law should be inescapable in the sense that only subsequent mutation consistent with it should be recognized. To allow a mutation as a result simply of a change of domicile is, of course, particularly liable to lead to hardship having regard to the doctrine that a married woman has no control over her domicile.

¹ [1966] 2 W.L.R. 620, 629.

² [1960] 1 W.L.R. 183.

³ [1966] 2 W.L.R. 620, 631. Simon P. in *Cheni v. Cheni*, [1965] 85, 91 placed the same interpretation upon *Ohochuku v. Ohochuku* as did Cumming-Bruce J.

⁴ [1960] 1 W.L.R. 183, 185.

⁵ (1866), L.R. 1 P. & D. 130.

⁶ [1965] 2 W.L.R. 620, 632.

⁷ *Brook v. Brook* (1861), 9 H.L.C. 193.

There are other difficulties and uncertainties. Does the doctrine of *Ali v. Ali* apply only to polygamists who acquire a domicile in a monogamous country? Or can, for example, English domiciliaries who marry in England become polygamists simply by acquiring a domicile of choice in a polygamous country? Would it have made any difference in *Ali v. Ali* if a second wife had in fact been taken before the parties acquired their English domicile? Is mutation recognized for all purposes or only in order to sidestep the rule in *Hyde v. Hyde*?

By way of postscript it may be mentioned that Cumming-Bruce J. let fall a dictum concerning the dispute between those who contend that a person's general capacity to marry is governed by the law of his or her pre-marriage domicile and those who regard this allegedly traditional 'dual domicile' test as qualified by reference to the law of the intended matrimonial home. This is an issue, said the learned judge, upon which 'both views are tenable and neither concluded by authority'.¹

Polygamous marriages and the criminal law

Case No. 3. The criminal law is one of the spheres in which English courts continue to show some discrimination between monogamous and polygamous marriages.

In *R. v. Bham*² the Court of Criminal Appeal decided in effect that an attempt to celebrate a polygamous marriage in England does not contravene section 75 (2) (a) of the Marriage Act, 1949. The subsection provides:

'Any person who knowingly and wilfully—(a) solemnizes a marriage . . . in any place other than—(i) a church or other building in which marriages may be solemnized . . . shall be guilty of felony. . . .'

The appellant, a Mohammedan, performed a ceremony of *nichan*, a potentially polygamous marriage in accordance with Islamic law, between a Mohammedan man and an English girl who adopted the Mohammedan faith, the ceremony being performed in a private house in England. The appellant's conviction under section 75 (2) was quashed. The principle applied seems to be that, the form of the ceremony being polygamous, it was not a form recognized by English domestic law as capable of producing when performed in England a valid marriage: 'It seems to us that counsel for the defendant is correct in his submission that the Marriage Act, 1949, which consolidates earlier Marriage Acts is dealing throughout with marriage as known to and permitted by English domestic law. The provisions of the Act prescribe and control the manner in which such a marriage may be solemnized. It does not seem to the court that the provisions of the Act have any relevance or application to a ceremony which is not and does not purport to be a marriage of the kind allowed by English domestic law.'³

It may be noted, although the point is not directly pronounced upon, that the tenor of the judgment is that no valid polygamous marriage can ever be celebrated in England.

The actual decision in *R. v. Bham* is as to the interpretation of a criminal statute. It is, of course, proper that in this context doubts should be resolved in favour of the accused. On the other hand, the decision creates a new instance in which discrimination is made between monogamy and polygamy, and in this sense runs counter to the general contemporary trend. It is to be remembered that a few years ago it was held in *R. v. Sarwan Singh*⁴ that a valid polygamous marriage cannot constitute a subsisting marriage for the purposes of a criminal charge of bigamy. Discrimination was again to the

¹ [1966] 2 W.L.R. 620, 629.

² [1966] 1 Q.B. 159.

³ *per* Thompson J., delivering the judgment of the Court at p. 168.

⁴ [1962] 3 All E.R. 612; criticized this *Year Book*, 38 (1962), pp. 483-6.

advantage of the accused. This contrasts with the dictum of the Privy Council in *Mawji v. R.*¹ to the effect that a polygamous marriage may be recognized for the purpose of the old rule that man and wife cannot conspire together criminally: in this instance failure to discriminate between the two types of marriage is to the advantage of the accused.

Non-recognition of foreign divorces .

Case No. 4. In *Middleton v. Middleton*² Cairns J. declined to recognize a divorce decree pronounced in the State of Illinois, although it would be recognized in the State of Indiana where at the time the parties were domiciled. The principle of *Armitage v. A.G.*³ was held to be inapplicable. The petitioner in the Illinois proceedings alleged that he had been resident there for over a year and that his wife had deserted him. The respondent wife had taken no part in the proceedings, although through her solicitors she had protested against her husband's allegations. These allegations were apparently untrue. The court accepted expert evidence to the effect that despite this fraud the Illinois decree, once pronounced, was regarded as valid in Illinois and in Indiana. Cairns J., although admitting that the fact that the husband's evidence as to the wife's desertion was false would not justify denial of recognition to the decree, held that fraud, as in the present case going to the point of jurisdiction, required the English courts to withhold recognition. The actual point is a novel one, but there is clearly no reason why the doctrine of *Armitage v. A.G.* should be exempt from the general rule that English courts do not recognize or enforce foreign judgments obtained by fraud, and Cairns J. so decided.

The concept of fraud going to the point of jurisdiction is not free from difficulty. Cairns J. seems to have taken jurisdiction in this context to mean not jurisdiction in the English private international law sense but rather the internal competence of the Illinois court. The Illinois court was jurisdictionally competent in the former international sense, because the parties were in truth domiciled in the English sense in Indiana, and English courts recognize as jurisdictionally competent foreign courts the divorce decrees of which are recognized in the courts of the domicile. There was no doubt that the Illinois decree would be so recognized. Illinois law required, however, that the plaintiff should have resided for over a year in the State, and it was on this score that it had been fraudulently misled. Cairns J. found support for his decision in *Bonaparte v. Bonaparte*.⁴ There Gorell Barnes J. declined to recognize a Scots decree because the parties, who were domiciled in England, misled the Scots court into believing them to be domiciled in Scotland. This fraud, therefore, was as to jurisdiction in the international sense as well as to the internal competence of the Scots court. A case of this sort could, it would seem, be decided on the short ground that, fraud or no fraud, the foreign court lacks jurisdiction according to English private international law. *Middleton v. Middleton* decides, however, that even though the foreign court has such jurisdiction, its decree will not be recognized if it was fraudulently induced into contravening its own rules as to internal competence.

The learned judge did state as alternative but secondary reasons for his refusal to recognize the Illinois decree the fact that to do so would involve contravention of notions of natural and/or substantial justice. Alternatively again, he referred to the possibility of a discretion to refuse recognition.⁵ It is submitted with respect that any

¹ [1957] A.C. 126. ² [1966] 2 W.L.R. 512. ³ [1906] P. 135. ⁴ [1892] P. 402.

⁵ Cairns J. cited *MacAlpine v. MacAlpine*, [1958] P. 35 and *Gray (orse. Formosa) v. Formosa*, [1963] P. 259. It is to be remembered, too, that in *Russ v. Russ*, [1964] P. 315 the Court of Appeal

attempt to subsume the well-established doctrine of fraud, either under the heading of denial of natural justice as traditionally understood, or under that of denial of substantial justice as obscurely propounded by the Court of Appeal in *Gray (or. Formosa) v. Formosa*,¹ must lead to confusion and uncertainty. So, too, any suggestion that the court has a general and ill-defined discretion to refuse recognition to foreign divorces pronounced by jurisdictionally competent courts ill accords with the compelling desirability of certainty as to marital status.

Foreign adoptions

Case No. 5. The dearth of English appellate authority on the private international law of adoption has been partially remedied by the Court of Appeal's decision affirming that of Pennycuik J. in *In re Valentine's Settlement*.² The facts were fully set out when the trial judge's decision was commented upon in this *Year Book*.³ The short question for decision was as to whether two children, domiciled in South Africa at the time of their adoption there by a couple domiciled in Southern Rhodesia, were to be regarded as children for the purpose of taking under an English settlement. Under the law of Southern Rhodesia an adoption order could not be made in respect of any child who was not resident and domiciled there; so no Southern Rhodesian adoption order was made in the instant case. The Court of Appeal by a majority (Lord Denning M.R. and Danckwerts L.J.; Salmon L.J. dissenting) answered the question in the negative. The whole Court was clearly prepared to countenance the recognition of foreign adoptions in some circumstances. *In re Wilby*,⁴ a case of intestate succession in which in 1956 Barnard J. refused to recognize an adoption effected in Burma when all parties were domiciled there, was said to have been wrongly decided. It was held, however, that the South African adoptions could not be recognized in the instant case because the adopting parents were not domiciled in South Africa and the adoptions would not be recognized in Southern Rhodesia.

The view was expressed *obiter* by Lord Denning M.R. that it would not have been necessary to show in addition that the children were domiciled in South Africa at the time of their respective adoptions: their residence there would have sufficed. This suggestion runs counter to the principle that status is a matter for the personal law and could lead to undesirable results. As Cheshire points out, 'since an adoption constitutes a crisis in the lives both of the natural parents and of the infant, it seems only just and reasonable that it should satisfy the law by which their personal relations are governed. The mere requirement that the infant should be resident in the adopter's domicile, does not adequately protect the interests of the natural parents, for its circumvention presents no great problem to an astute adopter.'⁵

It may further be remarked that to recognize an adoption unrecognized in the courts of the domicile of the natural parents is liable to create a 'limping' status. This will seldom be in the best interests of the child, which in adoption proceedings are of paramount importance.

In *Re Valentine's Settlement* the Court of Appeal further held that, even if the South African adoptions were to be recognized, the children would be treated in English law

interpreted the case of *R. v. Hammersmith Superintendent Registrar of Marriages*, [1917] 1 K.B. 634 as turning on the existence of a 'residual discretion' not to apply to law of the domicile.

¹ [1963] P. 259.

² [1965] Ch. 226 (Pennycuik J.) and [1966] Ch. 831 (C.A.).

³ 40 (1964), pp. 377-80.

⁴ [1956] P. 174.

⁵ Cheshire, *Private International Law* (7th ed., 1965), p. 386. But for another view, see Dicey, *Conflict of Laws* (7th ed., 1958), p. 460.

(the proper law of the settlement) as if they had been adopted in England. They would, therefore, be unable to take, as the settlement was made before 1 January 1950, and English adopted children by virtue of Section 5 (2) of the Adoption of Children Act, 1926, would have no rights under it. The law or laws governing the adoption determine status, but the *lex successionis* governs succession rights. A comparison with the position of a wife would be apt. The *lex loci celebrationis* and law of the domicile determine the validity of the marriage, but the *lex successionis* determines a wife's succession rights. The effect of recognizing a foreign adoption order in the context of an English succession is to put the adopted child into the position that he would have occupied had he been the subject of an English adoption order.

Presence as a basis for jurisdiction and the finality and conclusiveness of foreign judgments

Cases Nos. 6 and 7. In *Colt Industries Inc. v. Sarlie* (No. 1.)¹ the plaintiffs, an American Company, sought to enforce in England a judgment for the sum of nearly 2½ million dollars obtained by them in an action against the defendant in the Supreme Court of New York. The defendant was not resident in England but had been served with the English writ whilst he was staying at a London hotel for a few days on a visit unconnected with the litigation between himself and the plaintiffs. The defendant contended that an English court has no jurisdiction over a non-resident defendant, who does not otherwise submit to the jurisdiction, merely because he was physically present in England when the writ was served upon him. This contention was rejected by the Master and, on appeal, by Lyell J. in Chambers and by the Court of Appeal. This is not new law. Indeed it is well settled that English courts will themselves recognize the jurisdiction of a foreign court in circumstances similar, *mutatis mutandis*, to those in which it was assumed here: *Carrick v. Hancock*.² The principle that presence, for however brief a period, should suffice if the writ is served during that period, is open to criticism on the score of common sense,³ but the only deviation from this principle apparently permitted by the law is in the case of a defendant who is fraudulently induced to enter the jurisdiction.⁴

In the second *Colt Industries*⁵ case it was urged by the defendant that the New York judgment ought not to be enforced in England on the ground that it was not a 'final and conclusive' judgment. At the time of the English proceedings the appellate process in the State of New York was not exhausted in the sense that it was still possible for the defendant to be given leave to appeal. It is, of course, well established⁶ that a possibility of appeal does not in itself prevent the enforcement of a foreign judgment in England. As Lord Denning M.R. reiterated, in the instant case 'the proper test is this: Is the judgment a final and conclusive judgment of a court of competent jurisdiction in the territory in which it was pronounced'.⁷ If there were a stay on the New York judgment pending appeal, the judgment could not be sued upon while the stay persisted because, as Russell L.J. pointed out, 'present enforceability is relevant to the question of the finality and conclusiveness of a foreign judgment'.⁸ This was not the position in the instant case.

The particular interest of *Colt Industries Inc. v. Sarlie* (No. 2) lies in the rejection by

¹ [1966] 1 W.L.R. 440.

² (1895), 12 T.L.R. 59.

³ See Cheshire, *Private International Law* (7th ed., 1965), p. 548.

⁴ See *Watkins v. North American Land & Timber Co. Ltd.* (1904), 20 T.L.R. 534.

⁵ *Colt Industries Inc. v. Sarlie* (No. 2), [1966] 1 W.L.R. 1287.

⁶ *Nouvion v. Freeman* (1889), 15 App. Cas. 1.

⁷ [1966] 1 W.L.R. 1287, 1291.

⁸ [1966] 1 W.L.R. 1287, 1293.

Lyell J. and by the Court of Appeal of the contention that the New York judgment ought not to be enforced in England if it would not be enforced in the sister States of the United States pending a possible appeal. The decision is unequivocal and is epitomized in the words of Russell L.J. : 'I regard the possible attitude of sister States in the United States of America on the question of the present enforceability within their jurisdictions of the judgment as entirely irrelevant in the present case.'¹

It might seem curious that fuller 'faith and credit' should be given to a New York judgment on the opposite side of the Atlantic than is accorded to it on the opposite side of the Hudson River. However, private international law is, very properly, no respecter of the facts of either physical or political geography. It is the 'law district' that is the significant factor.

P. B. CARTER

¹ [1966] 1 W.L.R. 1287, 1293-4.

REVIEWS OF BOOKS

Académie de Droit International de la Haye: Recueil des cours, 1963. Volume 109. Leyden: A. W. Sijthoff, 1964. 607 pp. *Recueil des cours, 1964.* Volume 111. Leyden: A. W. Sijthoff, 1964. 727 pp. £4. 15s. each.

The two volumes reviewed contain substantial contributions to knowledge and understanding of a variety of subjects, none of which can be said to be peripheral. In the second volume for 1963 Professor Graveson presents a stimulating general course (pp. 7-158) entitled 'Comparative Aspects of the General Principles of Private International Law'. His comparison of English, American, French and German solutions to major issues is of great interest and relates significantly to his thesis that it is unsatisfactory to rely too readily on the *lex fori*. He detects some movement toward a more flexible approach by English courts to classification in regard to 'procedure' and in another connection suggests that a concept of the proper court be devised to correspond in the field of jurisdiction with that of the proper law in the field of applicable law. In general, Professor Graveson makes the reader aware of the interdependence of classification, jurisdiction and proper law, but his treatment of public policy suffers from nominalism (chapter III). He assumes that public policy is given a limited application by the English courts. On a comparative basis this is probably true and yet his presentation involves an acceptance of the superficial judicial usage: in fact many issues of classification, jurisdiction and choice of law turn on public policy (this is a matter of his presentation of public policy as a topic; elsewhere he specifically refers to the point (pp. 32-3)). There follows a short course by Oscar Schachter on 'The Relation of Law, Politics and Action in the United Nations'. A special significance always attaches to the *ex cathedra* views of official legal advisers and these forthright lectures by the Director of the General Legal Division of the Secretariat deserve close attention. The topics he considers are law and the process of decision in political organs, the technique and legal aspect of peace-keeping, and legal concepts in regard to economic and social development programmes fostered by the United Nations. It is the first of these topics which is treated at greatest length and what is said concerns matters of political science and the role of law in political crisis. In these matters he applies the method, whilst avoiding the terminology, of Professors McDougal and Lasswell. The result, as a matter of describing the role of the law, is of great interest. Less interesting, because it is predictable, is his consequential attitude to specific issues of legal interpretation. Thus a proposition concerned with Article 2, paragraph 4, of the Charter is supported, so far as writers are concerned, by reference only to the works of Professors McDougal and Feliciano and of Professor Stone. The reviewer has his *parti pris* on the issues of law involved and is concerned only to make the general point that *in substance* these writers have abandoned legal interpretation, whilst substituting a system of values which is at once as normative as the 'formal' rules they dislike and even more susceptible to auto-interpretation. Oscar Schachter's use of their approach to matters of law *as such* is unfortunate for these and other reasons: thus at times it leads to his confusing issues of law and fact and introducing casual factors influencing application into the description of the legal norm applicable.

Dr. Goedhuis provides a compact but well-presented treatment of 'Conflicts of Law and Divergencies in the Legal Régimes of Air Space and Outer Space'. The object

is to discuss various central issues, including the legal status of aircraft and air-space and of spacecraft and outer space, and liability for damage caused by aircraft and spacecraft, and to establish some integration of the issues and of relevant legal principles. The discussion is lively and practical sense is dispensed in addition to legal expertise. Dr. Goedhuis points out that the principle that celestial bodies are not subject to appropriation by States leaves unsettled a great many problems in the foreseeable event of manned stations being established on the moon, and in this connection he observes that there appears to be a lack of co-ordination between the organs of the United Nations concerned with the legal problems of outer space and those concerned with the political problems. Professor Goldman has made a substantial study of 'Les conflits de lois dans l'arbitrage international de droit privé', including therein the arbitration courts of Socialist States and arbitrations between governments and legal persons of municipal law. From the practice of international arbitration he finds evidence of the formation of 'un droit commun des relations commerciales internationales', a *lex mercatoria* consisting of rules of custom, which allows tribunals to reduce the role of the rules of conflict of laws. The volume is rounded off by lectures on 'La confiscation des biens étrangers et les réclamations internationales auxquelles elle peut donner lieu' by Sture Petré, legal adviser to the Swedish Ministry of Foreign Affairs and President of the European Commission of Human Rights. The topics he reviews include problems of diplomatic protection (including the nationality of companies), penal confiscation, taxation measures, expropriation and nationalization. He supports the rule requiring adequate compensation but differs in certain respects from other writers with similar views. Thus for him nationalization has a distinct legal character from expropriation and raises problems of a very different order. However, his conclusion is that the compensation rule has been sustained by recent treaties even in case of nationalization. He refers to, but is unimpressed by, the evidence of contradiction in State practice provided by recent developments in organs of the United Nations.

The first volume of the collection for 1964 begins with a study of 'The Doctrine of Jurisdiction in International Law' by Dr. Mann (pp. 9-162) which must remain the definitive treatment of the principles of the subject for some time. After establishing the relations of his subject Dr. Mann examines the territorial doctrine and makes a good case for replacing it by a more flexible and sensible doctrine based on substantial contact with a given set of facts. He points out that such an approach would be by no means out of step with some recent tendencies and refers to the *Fisheries* and *Nottebohm* cases. In his account of special topics he successfully emphasizes the dependence of civil jurisdiction upon international jurisdiction and gives an incisive review of problems of civil, criminal, trade practices, fiscal and monetary jurisdiction. Other topics included are the relation of private international law and legislative jurisdiction and the relevant aspects of statutory interpretation. There follows a course by Professor Stephen Szászy of the Hungarian Academy of Sciences on 'Private International Law in Socialist Countries', a subject on which he has published a book (English edition, 1964). Accompanied by ample bibliographies, the study now presented provides a vast amount of information in the framework of an admirably acute analysis of conflict of laws problems. There can be few jurists with such an impressive knowledge of conflict theory and the solutions of both western and Socialist countries. Whilst portraying a school of thought on conflict problems he leaves the reader with a heightened sense of the essential issues in conflict of laws. Moreover, he finds room for his own opinion on the preliminary question and other issues on which the literature of the East provides no answer or no agreed answer. The next contribution is also devoted

to conflict of laws: Professor Reese of the University of Columbia School of Law takes 'Discussion of Major Areas of Choice of Law' as his title. His discussion is oriented to an appraisal of the Restatement of Conflict of Laws Second (for which he was a reporter), with particular reference to contracts and torts. In the third chapter Professor Reese examines the views of Professors Currie, Ehrenzweig and Cavers on the basic policies involved in choice of law and prefers the views of Professor Cavers, who objects to the traditional rules of choice of law, *inter alia*, because of their 'jurisdiction-selecting' character. The contribution as a whole provides a valuable conspectus of the more interesting of the recent American developments.

Events affecting Guatemala (1953), Cuba (1960 onwards), and the Dominican Republic (1965), and the disputes between Haiti and the Dominican Republic (1963) and Panama and the United States (1964), have made necessary a careful examination of the relation of regional arrangements and the United Nations. Contributions on this subject are often so partisan as to be useless and the expert treatment given to this question by Professor Jiménez de Aréchaga in this volume is to be welcomed. The author is a member of the International Law Commission and has published a major work on the United Nations (Madrid, 1958) and it is unfortunate that his views are not taken into account more often in the literature in English. Professor Jiménez de Aréchaga presents the issues dispassionately and is careful in supporting his conclusions. Inevitably he considers the views of American lawyers in justification of the selective blockade of Cuba and exposes their casuistry. His contribution is marred, however, by a curious concluding section in which he justifies the American measures as being 'necessary, adequate and accepted' to maintain the nuclear *status quo*. A norm of this kind lacks all viability: would the United States accept Soviet and Polish coercive measures to prevent Western Germany's obtaining nuclear arms, and would the 'principle' be applied between allies also? The main question is, of course, to whom does the particular zone of *status quo* belong? The volume continues with a useful contribution by Professor de Laubadère on 'Traits généraux du contentieux administratif des Communautés européennes'. As he shows, the Coal and Steel Community has a régime superior to that of the Rome Treaty in this respect. The volume is completed by the course of Dr. Saba, Legal Adviser to U.N.E.S.C.O. on 'L'activité quasi-législative des institutions spécialisées des Nations Unies', which gives emphasis to the work of the I.L.O. and U.N.E.S.C.O. and particularly to the recent tendency for these bodies to place more importance on the techniques of application and enforcement of existing rules rather than further formulation of rules.

IAN BROWNLIE

British International Law Cases. Volumes 2, 3, 4 and 5. British Institute Studies in International and Comparative Law, No. 1. London: Stevens & Sons Ltd.; New York: Oceana Publications, 1965-1966. Vol. 2, xvi + 959 pp.; Vol. 3, xx + 892 pp.; Vol. 4, xix + 854 pp.; Vol. 5, xxiii and 731 pp.; Vols. 2, 3 and 4, £9. 9s.; Vol. 5, £8. 10s.

The first volume of this important enterprise was reviewed in volume 39 of this *Year Book* at p. 494. These further four volumes have appeared with commendable promptitude; and it is understood that a sixth is in an advanced stage of preparation.

These volumes bring together and make readily available for the first time virtually all reported international law cases of any significance decided up to 1950 by courts in the British Isles including appeals from the Commonwealth to the Judicial Committee

of the Privy Council and Irish cases, but excluding cases dealing solely with private international law, with war or neutrality, or with prize. There are so far getting on for 700 cases in all. Quite a lot of them were previously to be found only by searching the files of *The Times*. There is necessarily some overlap with the *Annual Digest* between 1919 and 1950, the year when the *Digest* became the *International Law Reports*. But some cases were missed in the *Digest*; moreover the present series unlike the *Digest* gives the entire report of a case *verbatim* so that, for example, *Regina v. Keyn* is allowed the needful 100 pages and *Calvin's* case 90 pages.

The cases are conveniently arranged under broad headings, these being in turn divided into fairly broad subheadings; within the subheadings the cases are arranged chronologically. The first part of Volume 2 continues the Volume 1 main heading of 'States as International Persons', setting out two important further groups of decisions, dealing with 'recognition' and 'succession'. The remainder of the volume, under the main heading of 'State territory', comprises groups of cases under the headings of occupation and settlement, annexation and cession, boundaries, rivers, territorial waters, bays and lakes.

Volume 3 is entirely devoted to the great topic of jurisdiction: territorial, personal and extraterritorial, and includes jurisdiction on the high seas—the classic slave-trade cases, fishing-limit cases, cases concerning piracy and submarine cables. There are no cases on jurisdiction over aircraft.

Volume 4 and Volume 5 deal with the large topic of the individual in international law; and here is a rich collection of materials on all aspects of nationality and problems of protection, including double nationality and statelessness, recognition of foreign nationality, and nationality of corporations and of ships, admission treatment and expulsion of aliens, extradition, and surrender under the Fugitive Offenders Acts.

A valuable feature of the expert editing of these volumes is that each one has a cumulative list of subject headings, a cumulative list of cases reported, and what is much more—a really excellent cumulative index. Here then is a superb tool of research. For the first time it is possible very quickly to turn up and read virtually the whole of British jurisprudence up to 1950 on a given topic of international law. But a work such as this one does more than make the material available: it also demonstrates the nature and scale of the impact of international law upon British jurisprudence. This work is, therefore, more than a tool of research; it is itself a significant new contribution to our understanding of the law. The title-pages of these volumes remain curiously anonymous; but it is of course Dr. Clive Parry and his collaborators to whom the thanks of all international lawyers are due.

It is a pity that the appearance of the pages of these books is by no means equal to the value of their content. In particular, the inner margins of the pages are mean to the point of inconvenience, and the choice of type faces is not always very happy. A book that calls for constant use should if at all possible be made pleasing to the eye.

R. Y. JENNINGS

Cambridge Essays in International Law: Essays in Honour of Lord McNair. London: Stevens & Sons Ltd., 1965. 186 pp. (including Index). £2. 12s. 6d.

This book contains seven essays written by Cambridge international lawyers in honour of Lord McNair in the year of his eightieth birthday. As the foreword explains, it does not aim 'to reflect McNair's world-wide work and influence in the cause of international law'; it is a domestic tribute from the Faculty of Law, recognizing his

life-long devotion to the teaching and study of public international law in Cambridge. No tribute could be more felicitous. Three of the seven essays are by Sir Gerald Fitzmaurice, Sir Francis Vallat and Dr. C. W. Jenks, international lawyers holding posts of high distinction outside Cambridge, all of whom are former pupils of McNair and members of his own College. The remaining four are by members of the Faculty, Professor Jennings, Dr. C. Parry, Dr. D. W. Bowett and Mr. E. Lauterpacht, academic lawyers of acknowledged authority and two of whom are also former pupils of McNair.

Four of the essays are in the field of general international law. Judge Fitzmaurice writes on 'Judicial Innovation—its Uses and Perils—as Exemplified in some of the Work of the International Court of Justice during Lord McNair's period of Office'. First, he takes two innovations with which McNair was in agreement: (a) the Court's endorsement of the legal personality of the United Nations in the *Reparation for Injuries opinion*,¹ of which McNair himself has said² that 'viewed *sub specie aeternitatis*, it is probably the most important Opinion that the Court has given'; and (b) the Court's recognition in the *Corfu Channel* case³ of the obligation of a State to notify for the benefit of shipping the existence of a minefield in its territorial waters. In the latter case it might indeed be said that there were several innovations of a similar kind participated in by McNair—progressive pronouncements by the Court assisting principles hitherto 'only implicitly discernible'⁴ to cross the Rubicon which divides custom from law;⁵ and not the least of these were the Court's rulings regarding the character and the régime of international straits. Judge Fitzmaurice then cites three innovations in which McNair did not concur: (a) the Court's endorsement in its Opinion on *Reservations to the Genocide Convention*⁶ of 'object and purpose' as the criterion for the permissibility of reservations to multilateral treaties together with the Latin American doctrine admitting any 'reserving' State as a party except with respect to a State objecting to the reservation; (b) the Court's finding in its original Opinion on the *South-West Africa Mandate*⁷ that the Mandatory is accountable to the United Nations; and (c) the Court's acceptance in the *Norwegian Fisheries Case*⁸ of the 'general direction of the coast' as the established general principle for determining the base-line of territorial waters. Judge Fitzmaurice, who in principle aligns himself with McNair's dissent from these innovations, adds a comment in which perhaps may be seen the shadow of the *South-West Africa* cases:⁹ 'If he [McNair] could not always concur in them, this, as all who know him would agree, was not on account of any hostility to innovation as such, but because, in his view, a judicial innovation . . . , however desirable it might be from other standpoints, is too dearly purchased if it is made at the sacrifice of the integrity of the law.'

Professor Jennings contributes a stimulating study of 'Nullity and Effectiveness in International Law'. Recalling Sir Hersch Lauterpacht's observation that 'the absence of a more direct means of enforcement tends to endow the principle of nullity of illegal acts with particular importance in the international sphere', Professor Jennings points out that the development of a law of international institutions has added a new dimension to the whole question. He distinguishes between acts characterized by the law as (a) legally non-existent (e.g. an ineffective blockade), (b) existent but null and void *ab initio* (e.g. a treaty having an illegal object) and (c) null not *ab initio* but only as from a subsequent date (i.e. a nullity operating *ex tunc*); and he then considers the relevance

¹ *I.C.J. Reports*, 1949, p. 174.

² *Law of Treaties*, p. 51.

³ *I.C.J. Reports*, 1949, p. 4.

⁴ Judge Altamira, Dissenting Opinion in the *Lotus* case (*P.C.I.J.*, Series A/10, at p. 106).

⁵ Sir John Fischer-Williams, *Aspects of Modern International Law*, p. 44.

⁶ *I.C.J. Reports*, 1951, p. 15.

⁷ *Ibid.*, 1950, p. 128.

⁸ *Ibid.*, 1951, p. 116.

⁹ *Ibid.*, 1966, p. 6.

of these distinctions in a number of different international law situations. He makes interesting comments, *inter alia*, upon nullity in relation to the Stimson doctrine of non-recognition, in relation to the application by a municipal court of the principle *ex injuria non oritur jus* in the *Rose Mary*¹ type of case, and in relation to *ultra vires* acts of international organs. Not much has been published—in English at any rate—on the topic of nullity in international law, and Professor Jennings's paper represents a valuable introduction to some of the major problems.

Sir Francis Vallat provides a general survey of the various procedures for the 'Peaceful Settlement of Disputes inside and outside the United Nations'. This essay by the Foreign Office Legal Adviser has an added interest in the light of Her Majesty's Government's recent initiatives in the United Nations emphasizing the need to give greater attention to the peaceful settlement, as distinct from the peace-keeping, function of the United Nations.² Having drawn attention to the existing powers of the Security Council and General Assembly for the purposes of conciliating disputes, he points out the factors which prevent the vast potential which these bodies have for the settlement of disputes from being used effectively. Among these he notes the marked reluctance of the General Assembly to refer even its own legal problems to the 'principal judicial organ' of the United Nations and urges a greater recourse by the Assembly to advisory opinions. Here he apparently has in mind the use of advisory opinions to settle legal points arising as an incident in the Assembly's handling of an ordinary contentious dispute between States as well as a means for resolving constitutional controversies within the Organization. He stresses, if necessarily with brevity, the value of other legal procedures of settlement outside the United Nations—arbitration, the Court of Justice of the European Communities, the European Commission and Court of Human Rights, the International Bank's Convention on the Settlement of Investment Disputes, etc. But he concludes that of all the vast range of machinery for peaceful settlement now available 'the outstanding creation of the century for the settlement of legal disputes is undoubtedly the International Court of Justice', of which McNair himself was so distinguished a Judge. Observing that the practical value of the Court depends on the extent of the support which it receives from States, he underlines the need to increase the confidence of Governments in the Court. Their fears of the Court are, he urges, largely groundless. France, the United Kingdom and the United States have been among the most frequent litigants and 'win or lose they have, on the whole, been helped in the conduct of their foreign relations by the reference of legal disputes to the Court'.

The last of the papers in the field of general international law is an interesting study by *Dr. Clive Parry* of the 'British Consular Conventions'. He begins by raising the question whether the popular conception of the consul as the official protector of his fellow nationals is accurate historically and under the existing law; and he suggests that the point is not so much whether the Consul's functions are international (even if Hall seemed to deny this) as whether they are confined to dealings with the local authorities. Then he examines the legal basis of consular immunity, taking the position that it is not the same as that underlying the immunities of a diplomatic agent but is rather an immunity attaching simply to the official acts of the sending State. Indeed, he prefers the view that it is not really a case of jurisdictional immunity at all but of 'simple non-liability for official acts'—i.e. for acts which in law are not those of the Consul but of the sending State. The heart of Dr. Parry's paper, however, is his account of the

¹ I.L.R., 1953, p. 316.

² See also a recent *Report on the Peaceful Settlement of International Disputes* by a Study Group of the David Davies Memorial Institute.

origins of British Consular Conventions and the legal policies regarding consular functions and consular immunity which they reflect. These Conventions, concluded during the past twenty years with a number of States, assume, as he points out, that the protection of nationals is a proper function of consuls; and also stipulate for a general rule of immunity from process, rather than of mere non-liability, for official acts. Dr. Parry's study of the British Conventions is of particular interest because of the influence which they undoubtedly had on the drafting of the 1963 Vienna Convention on Consular Relations. On the other hand, as he indicates, on some matters there are differences between the Vienna Convention and the British Conventions which may pose a problem in regard to the ratification of the Vienna Convention by Her Majesty's Government.

The remaining three essays—sign of the changing emphasis in international law—concern problems of international organizations. Mr. Lauterpacht's 'The Legal Effect of Illegal Acts of International Organizations' develops a theme already touched on by Professor Jennings—the nullity or avoidance of *ultra vires* acts of international organizations. *Ex hypothesi*, the problem could scarcely arise in the classical system of international law before the creation of the League and the growth of modern international organization, except in the analogous context of an alleged *excès de pouvoir* by an arbitral tribunal. Mr. Lauterpacht examines the evidence but finds that it does not give a clear answer to the question whether a vitiating factor renders an arbitral award automatically null or merely provides grounds for a party to allege its invalidity. He then turns to the practice of international organizations in the matter, citing the specific provisions for the judicial control of the legality of acts of international organs which are contained in the European Communities Treaties, in the Charter of the International Trade Organization and in the Statutes of the International Labour Organization and other administrative tribunals. The most significant part of his paper, however, is perhaps his penetrating examination of the issues in the *I.M.C.O.*¹ and in the *Certain Expenses of the United Nations*² cases; and especially his discussion of what in fact happened within I.M.C.O. after the delivery of the Court's Opinion pronouncing the unconstitutionality of the Maritime Safety Committee. His general conclusion is that through all the material there runs the common thread that 'as a matter of principle illegal acts ought not to give rise to valid and permanently effective consequences in law'; but that the application of this principle may be affected by a number of mitigating factors. These factors, he suggests, include the relevance of judicial review, the possibility of specific regulation, the presumption of validity, the limitation of the categories of illegal acts treated as null, acquiescence, lapse of time, the severability of null from valid provisions, and perhaps the relativity of nullity, i.e. the possibility that an act may be treated as null by one State but as valid by another.

Dr. Jenks's essay 'Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations' pursues a topic which he first broached in 1945 in an important article in the *British Year Book of International Law* on constitutional problems of international organizations. The unanimity principle, he observes, is 'workable only within a relatively homogeneous organization with a highly developed sense of common purpose', but in any wider forum brings paralysis and is now a discredited principle. Recalling that the veto was originally a reasonable compromise to make possible the freeing of United Nations organs from the burden of securing unanimity, he explains that the revolt against the veto in 1950 in the Uniting for Peace Resolutions had a paradoxical effect. This was to substitute for a requirement of unanimity among the permanent Members of the

¹ *I.C.J. Reports*, 1960, p. 150.

² *Ibid.*, 1962, p. 151.

Security Council creating decisions having binding effect a practice of adopting by a two-thirds majority of the Assembly non-binding recommendations which—according to the *composition* of that majority—may or may not be just as effective *de facto* as a Security Council decision. Now, he suggests, there are signs of an attempt to reformulate the original concept underlying the veto in the more acceptable form of a ‘consensus of view shared by those whose co-operation is necessary in practice to make the decision effective’. This leads Dr. Jenks into a discussion of ‘weighted’ and other ‘special’ majorities applied in certain other international organizations and into a general consideration of the concept of ‘consensus’ as found in international commodity agreements and in such bodies as the Commodity Councils and U.N.C.T.A.D. The general conclusion of his brief but illuminating essay is: ‘a wider acceptance of the principle of consensus represents the only realistic approach to many of our difficulties. The only valid test of the value of international organization is the effectiveness of the results secured. With an increasing recognition of the importance of consensus there may be a growing disposition to prefer the negotiated agreement to the unilateral *pronunciamento*’.

Finally, there is an excellent essay by *Dr. Bowett* on the very difficult topic of the ‘Relationship of the Proposed International Disarmament Organization to the United Nations and to the Veto’. He compares the respective concepts of the I.D.O. found in the Soviet and United States Draft Treaties. If both drafts envisage a disarmament organization related to but separate from the United Nations and having a ‘general Conference’ of all Members plus a Control Council analogous to the Security Council, they differ, he notes, in certain respects. The Soviet draft provides for a ‘Troika’ secretariat, the United States draft assumes a single, strongminded, administrator as head of the Secretariat. The Soviet draft subordinates the I.D.O. to the Security Council in all matters of enforcement, whether of disarmament obligations or in regard to peace and security; the United States draft is silent on the question of enforcement and, if it envisages this as a United Nations responsibility, does not exclude its being entrusted to a body other than the Security Council. Dr. Bowett then comments upon the Clark-Sohn draft for a ‘Treaty establishing a World Disarmament and World Development Organization within the frame-work of the United Nations’, which assumes the inefficacy of the United Nations machinery and proposes a powerful new organization that would virtually relegate the United Nations to a secondary role concerned with the settlement of disputes and multilateral economic and technical aid. He himself favours a solution on the lines of a close integration of the disarmament machinery into the existing United Nations structure unless and until the size of the disarmament task is shown to be so large as to compel recourse to an autonomous organization. Dr. Bowett then enters more closely into the delicate questions of the ‘processes of inspection’, of ‘assessing the information gleaned by inspection’ and of determining the ‘sanctions and responses’ for dealing with infringements of disarmament undertakings. Here his mastery of the subject and of the procedures of international institutions enables him to illuminate problems which are assuredly among the most intractable in international organization today.

Readers of this volume will thus surely feel that the graceful tribute which is here offered to McNair does honour alike to the Cambridge Faculty and to its distinguished doyen.

C. H. M. WALDOCK

Fontes Iuris Gentium. Vol. 4, Series A, Section 1. Cologne: Heymanns Verlag, 1964. xxxi+268 pp. (with Index). £6.

Tomus 4 of Series A, *Section 1* of *Fontes Iuris Gentium* has now made its welcome appearance. *Tomus 1* appeared in 1931 and *Tomus 3* in 1935, covering the jurisprudence of the Permanent Court of International Justice and of other tribunals set up under the Permanent Court of Arbitration. [What happened to *Tomus 2* of Series A, *Section 1* remains something of a mystery.] After this the editors turned to producing *Tomus 5*, which was devoted to the decisions and opinions of the International Court of Justice up to 1958.

The Max Planck Institute for Foreign Public Law and International Law has now gone back to the task of completing the earlier set of volumes on the Permanent Court of International Justice, and *Tomus 4* is the third and final volume of the *Fontes Iuris Gentium* allotted to that Court. The work has been done under the supervision of Rudolf Bernhardt and Otfried Ulshöfer. This volume closely conforms, in arrangement and method, to the earlier ones. The cases falling within the period under consideration (beginning with the Judgment in the *Oscar Chinn* case [Series A/B, No. 63] and terminating with the Order of 26 February 1940 in the *Electricity Company of Sofia and Bulgaria* [Series A/B, No. 80] are dealt with in terms of traditional heads of international law. Within the broad scope of 'substantive international law', the case material is used to illustrate seventeen chapters, covering such matters as the foundations of international law, subjects, nationality, territory, State responsibility, and so forth. Within a second broad grouping of 'international jurisdiction' there fall a further five chapters, devoted to bases of jurisdiction, jurisdiction, procedure, judgment and advisory opinions. Selections are made from each case, therefore, and placed under the appropriate chapter.

Separate opinions are included as well as the majority decisions or opinions, and the two are differentiated by the typeface. However, it is not possible for the student to learn whether it was *on the point at issue* that the learned judge felt obliged to enter a separate vote, or whether his disagreement lay in some other quarter. Again—and here one may contrast the practice which Hambro has followed in his *Case Law of the International Court of Justice*—dissenting opinions appear not to have been included.

A further comparison with Hambro's approach is interesting. Hambro, too, breaks down his materials into a traditional cluster of textbook headings, though inevitably they differ in some respects from the break-down of *Fontes Iuris Gentium*. He uses dissenting opinions as well as separate opinions, but has collected them in separate volumes; and, like these editors, he has provided under each subject heading copious cross-indexing to other volumes, so that the reader has a ready guide to the total jurisprudence of the Court on any major topic, provided that it falls within the chosen framework. The body of *Tomus 4* is in French and in English, and the Preface and all supplementary materials are in German, French and English. The volume includes a list of all the judges, including the *ad hoc* judges, who served between 1926 and 1946; a chronological list of the orders, judgments and opinions in the entire series; and an Index. This last, while adequate, is less detailed than the one prepared by A. Welsby for Hambro's volumes.

The purpose of *Fontes Iuris Gentium* is not, of course, to give the reader a break-down of the facts and legal arguments at issue in each case; rather it is to provide a detailed guide to the jurisprudence of the Court with respect to specific questions of international law, as revealed in the cases which came before it. It provides an invaluable service to the scholar and a formidable amount of work has gone into

producing these clear, handsome and thorough volumes. The lawyer who has them on his bookshelf is fortunate indeed.

ROSALYN HIGGINS

Foreign Relations Law of the United States. Restatement of the Law. 2nd edition. St. Paul, Minn.: American Law Institute Publishers, 1965. xxvi + 679 pp. \$18.50.

The American Law Institute is a private body dedicated to the clarification and improvement of the law. It is responsible for those massive Restatements (the 2nd edition is now in progress) which, though emanating from a strictly private organization, have come to be recognized as authoritative, or at least highly persuasive, statements of the law of the United States. The first edition did not include anything approaching a Foreign Relations Law. But work on such a volume began in 1955 and resulted in an official draft which was accepted in principle by the Institute in May 1962, after parts of it had been considered by a European Advisory Committee under the Chairmanship of Lord McNair. The draft of 1962 was carefully re-examined and revised. The work was finally published under the above title and is described 'as adopted and promulgated' by the American Law Institute. Moreover, the Reporters' Preface emphasizes that the work 'represents the opinion of the American Law Institute as to the rules that an international tribunal would apply if charged with deciding a controversy in accordance with international law' (p. xii). Yet, curiously enough, in his Introduction the Institute's Director states more than once that what is being published is 'the Official Draft of the Restatement of the Foreign Relations Law of the United States'. The reference to an official draft is likely to be due to a slip.

However this may be, the description 'Foreign Relations Law' is of very recent (American) origin, and perhaps it is useful in the first place to indicate what it is, and what it is not intended to comprise. According to section 2 it means:

- '(a) international law as defined in S. 1 [i.e. those rules of law applicable to a state or international organization that cannot be modified unilaterally by it];
- '(b) part of the domestic law of the United States by which it gives effect to rules of international law;
- '(c) any other part of the domestic law of the United States that involves matters of significant concern to foreign relations.'

Among the qualifications not expressed by this definition there is the fact that the present volume deals only with four topics, i.e. jurisdiction; recognition; international agreements; responsibility of States for injuries to aliens. Accordingly, irrespective of the impression created by paragraph (a), substantial parts of international law are omitted, the most notable, probably, being the law of warfare.

Much greater difficulty is caused by paragraph (b). Particularly in the chapters dealing with recognition and international agreements a clear distinction is drawn by the arrangement of sections (though the casual reader is liable to overlook it) between international law and the law of the United States. Thus, in the chapter on recognition only section 113 dealing with the effect of non-recognition on the application of foreign law and section 114 on the effect of recognition are marked as relating to the law of the United States. Does this mean, for instance, that section 111 represents, not the law of the United States, but 'only' international law, when it suggests that the government of a State may exercise the State's rights and must perform its obligations even though it has lost control of all or a major part of the State's territory? The question is the more

justified as the comment to section III refers to United States statutes and decisions (among others) and does not in any way make it clear that what is propounded as a rule of international law does not necessarily constitute domestic law.

And if, on account of paragraph (c), some readers should be inclined to expect a foreign relations law to include the conflict of laws, it must at once be emphasized that this branch of the law is entirely outside the scope of the present volume.

Although the authors of the *Restatement* may disagree, the foreign relations law should be viewed against the background of the history of codification in international law. The American Law Institute has produced the most recent attempt to press large parts of international law into forms designed and (perhaps) suitable for a fully developed and established system. It thus finds its place next to the Harvard Research (in many respects still the unsurpassed achievement in this field), the more recent proposals originating from Harvard, the work done by or for the International Law Commission, the *Institut de Droit International* and other organizations. The influence and authority of such work is proportionate to its academic merit. The Harvard Research carried great weight, because the outstanding quality of the effort that contributed to it was obvious to every reader. In the case of a restatement sponsored by the American Law Institute there is an additional test to be applied. It arises from the fact that, however loudly the private character of the Institute is being proclaimed, Judges and practising lawyers in the United States tend to regard a rule embodied in the *Restatement* as having almost statutory force. While other forms of codification of international law are subject to a slow and long process of critical analysis, a restatement may result in the speedy emergence of a peculiarly American rule, and this may not always be conducive to the sound development of international law.

In the light of such considerations the *Foreign Relations Law* deserves much gratitude and praise. Although the technical apparatus and the supporting material is sparingly displayed—and much could be said about the absence or omission of evidence—in numerous instances the work testifies to the learning and acumen of the distinguished individuals who accept responsibility for it, particularly the Chief Reporter, Mr. Adrian S. Fisher, a former Legal Adviser to the Department of State, who was assisted by Mr. I. N. P. Stokes, Professor Covey T. Oliver, Professor Cecil J. Olmstead, Professor Sweeney, Professor Noyes Leech, Mr. Robert E. Stein and others. Many sections formulate the law with attractive precision or suggest texts which, though probably not fully supported by authority, tend to initiate progressive evolution. Other sections will stimulate further evolution. Other sections will stimulate further thought or research. This is likely to apply to section 18 which relates to a very pressing problem, which, since it first appeared in the draft of 1962, has received more attention than any other section. Because it may come to exercise considerable influence, it should be quoted in full:

‘A State has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

‘(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of States that have reasonably developed legal systems, or

‘(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by States that have reasonably developed legal systems.’

The reference to 'reasonably developed legal systems' occurs throughout the book, though the phrase is explained only at p. 503. It denotes the same thought as the general principles of law recognized by civilized nations in Article 38 of the Statute of the Court. However, the latter phrase 'has recently been criticised as inappropriate in view of the advance of civilisation in all parts of the world'.

While the list of merits could be much extended, it must not be allowed to conceal the numerous doubts which surround both the undertaking as a whole and the manner in which it has been carried out. These usually arise from the somewhat perfunctory foundation upon which the rules and the explanations supporting them rest. Examples abound, and only a few, taken at random, can, or need, be given here.

On p. 147 it is suggested that, while a State may not normally enforce its law in the territory of another State, this does not apply to 'routine administrative actions such as giving notice, even though such notice may be a controlling factor in enforcement proceedings subsequently brought within the territory of the acting state and therefore exercise a compulsive effect'. This seems to be put forward as a rule of international law and as such is open to much doubt.

No help is given to the reader who wishes to know how the 'principles of justice recognized by States that have reasonably developed legal systems' can be found and whether they have been violated. To an international practitioner this is frequently a crucial problem on which he needs guidance. Such elementary conceptions as estoppel or abuse of right do not seem to be mentioned at all. Nor is any attention given to the implications of the *Corfu Channel* case and the duty of care recognized by it.

If an American court is entitled to apply the law of an unrecognized State in so far as it relates to 'matters of an essentially private nature' (p. 354) how are such matters to be defined? Do they include the authentication of a power of attorney? (see *In the Estate of Luks*, 256 N.Y.S. 2d 194 (1965) and the earlier authorities there referred to.)

While sections 185-92 which deal with the taking of property state the law in a generally satisfactory way, sections 193-5 treat breach of contract in terms which suggest wholly inadequate investigation. What is meant by the statement (p. 575) that the breach by a State of a contract with an alien is wrongful under international law if 'the State entered into the contract with the alien . . . in his capacity as an alien'? It is good to know that the authors have adopted the view (p. 585) that the State and the alien 'may agree that the contract is to be governed by general principles of law'. But the further question whether a contract might also specify that it is governed by international law, is not convincingly answered, nor is it explained what the distinction between the two clauses may be.

In the sphere of State responsibility the *Restatement* deals with the defence of justification and propounds section 198 according to which

'Conduct attributable to a State and causing damage to an alien does not depart from the international standard of justice indicated in s. 165 if it is reasonably necessary to control the value of the currency or to protect the foreign exchange resources of the State.'

Why select currency control as a special defence? What about tax or import control? And if currency control deserves separate treatment, would it not be proper to refer to the Articles of Agreement of the International Monetary Fund or to the decision of the International Court of Justice in the case concerning the *Rights of U.S. Nationals in Morocco*? In view of the Chief Reporter's connection with this case and its presentation the failure to give any weight to it or to the literature it has provoked is particularly remarkable.

Such and similar criticism is not intended to detract from the value of the work as a whole. In a country in which so representative a publication as Halsbury's *Laws of England* fails to include international law among its titles it should not be difficult to appreciate the progress involved in the adoption by the American Law Institute of a foreign relations law and, even more significantly, in its promulgation as part of the *Restatement*. Such an undertaking is apt to create general awareness of international law, its content, problems and aspirations, and in present circumstances this may be more important than refinements of formulation and elaboration.

F. A. MANN

The Law of International Waterways. By Professor R. R. BAXTER, with research assistance of Dr. Jan F. Triska. Cambridge, Mass.: Harvard University Press, 1962. 371 pp. \$9.50.

This is an important work. It grew out of a study undertaken by the Harvard Law School begun at the suggestion of the Suez Canal Company, and was continued and completed after the nationalization of that company. The project was financed under the Carnegie Corporation's programme of International Legal Studies. Having regard to the origins of the work it is natural that the sub-title indicates that the study has been made 'with particular regard to inter-oceanic canals'. But the proper study of inter-oceanic canals necessarily required that the work should include rivers and straits also, for 'straits, canals, and rivers share the geographic characteristics of bringing maritime highways into close contiguity with land' (p. 1). The work is limited to problems of navigation in international waterways, but other uses of those waters are of course considered in so far as they may compete with navigation requirements and thus give rise to a conflict between different users of the waters.

There is a most suggestive and original introductory chapter of some fifty pages which is so to speak the 'general part' of the book. It is not always easy going but it repays close attention. It deals first with questions of definition both of international waterways and of the different kinds of interest which may exist in them, e.g. the interests of users, of the territorial sovereign, or of the operating agencies, strategic interests and so on. The material upon which this analysis is based is, in great measure, political or economic geography rather than law and its form is statistical rather than conceptual. But it all leads finally to an essentially legal question: how far different waterways and their different régimes may reasonably be treated as analogous, and as exhibiting general legal principles? How far, for example, does the existence of different treaties governing different inter-oceanic canals inhibit the formulation of any principles of general law? Professor Baxter's view is that 'the existence of different conventions governing the canals is not, however, an obstacle to the drafting of general principles on the subject and may actually be an additional reason for making such an attempt'. And indeed this conclusion may be said to be the underlying thesis of the book as a whole.

In the following chapter Professor Baxter considers in considerable detail 'the operating or supervising agency'; this chapter is in five sections dealing respectively with private company administration, operation by a foreign sovereign, operation by the territorial sovereign, operation by international co-ordination and operation through international commissions. This long chapter is inevitably mainly descriptive but it is of great interest and importance just because it is not a mere description of legal institutions but succeeds throughout in setting these legal institutions in their proper

social and political context. The chapter ends with a short statement of seven 'lessons of the past', which must be of interest to students of international organization generally.

Two further chapters deal with the main substance of the matter, viz. the passage of ships through international waterways in time of peace, and the passage of ships through international waterways in time of war. The method again is a full exposition and meticulous analysis of materials leading to certain general conclusions. There follow chapters on legal controls in the fiscal sphere, certain technical problems of administration, i.e. those concerning the physical requirements of passage such as maintenance, dredging, etc., and finally there is a chapter on the international administration of international canals. This leads to an interesting and instructive attempt to draft articles on the navigation of international canals by way of a suggested possible codification.

Professor Baxter's book, it is safe to predict, will be the definitive treatise on the law of international waterways for a long time to come. Not only does it present a rich mine of material but it presents it in a notably perspicuous and readable form. But it is much more than a convenient source of precedents or an exposition of concepts. Where problems and materials are so rich in quantity but at the same time so diverse, a work which assembles, analyses and rationalizes, is also a real contribution to the actual development of the law itself. It is like the law report to the precedent; in theory the law is there all the time, but until it has been made available and usable in a law report it has limited actual value.

There is a further point of some importance. This book is a study of the law of international waterways; but it is also perforce a most interesting and suggestive study of the nature of the sources of international law in general. It should be recommended reading for any student of general international law and not just for those having a special interest in international waterways.

Besides a list of cases there is a very useful list of treaties.

R. Y. JENNINGS

Historic Titles in International Law. By YEHUDA Z. BLUM. The Hague: Martinus Nijhoff, 1965. xxix + 360 pp. (with indexes). Fl. 40.50.

One may observe in the practice of States endorsement of different modes of acquisition of title to territory. In some cases, title vests immediately as the result of an act directed towards that end. In other cases what is observable is that at the end of a period of time title has become vested, although we cannot point to a specific moment of time or a specific juridical act connected with the vesting. It is Dr. Blum's thesis that it is acquiescence which underlies these 'historic titles', and consolidation which is the process of their establishment. Historic titles are established after, but not on account of, effluxion of time—there is no doctrine of prescription in international law.

It is the opinion of the reviewer that this thesis is not sustained. The author has been seduced by the lure of the golden thread and has sought to prove that all such titles must have a common basis. This is hardly possible, for reasons which will be stated presently. This is not to suggest, however, that the book is not of great value, for incidentally, in attempting to maintain the thesis, a wealth of extremely useful work has been done. The sections on the significance of silence (pp. 131-8) and 'protest' (pp. 152-72) are gems of classification and analysis, and the chapters on interpretation and evidence (chapter V) and maritime titles (chapter VI) are invaluable commentaries on these subjects.

To return to the main thesis: this requires the conclusive establishment of two independent propositions:

(1) That there is no adequate authority for the existence of a doctrine of acquisitive prescription, as defined by the author, in international law; and

(2) That the situations to which the term 'acquiescence' is ascribed by the author are homogeneous—so that the concept is unitary.

Neither is established. The first section of the book is concerned with the first proposition and in his analysis of the authorities supporting the existence of prescription, Dr. Blum is sometimes unfair, sometimes inconsistent and sometimes ambivalent. It is unfair to search juristic writings for *justifications* for prescription (p. 12) and then take their authors to task for confusing justification with *existence* (p. 15). It is inconsistent to acknowledge the prevalent view that good faith is not needed in international law prescription (pp. 18–19) and then treat its non-necessity in acquiescence as being an advantage enjoyed by the latter as against prescription (p. 60). And it is ambivalent to charge prescription with uncertainty of application by virtue of the lack of a specific period of time (p. 19) without also so charging acquiescence in some of its modes.

In dealing with prescription, the survey of juristic writings omits reference to some whose statements, quoted in other contexts in the book, might seem to require comment, such as those of Hyde (pp. 60–1) and even Johnson (pp. 99–101), whilst that of de Visscher, quoted at p. 102, is particularly relevant. There seems also to be either selectivity or ambivalence in the treatment of judicial decisions—in relation to prescription the approach is very much the narrow common law one of emphasis of the *ratio decidendi*—*obiter dicta* in the *Eastern Greenland* case are thus discounted in relation to prescription (p. 24); but they are cited unconditionally in support of acquiescence (p. 50). There seems, similarly, to be some special pleading in dealing with treaty provisions at pages 35 and 36 (cf. the more charitable attitude in relation to acquiescence at p. 38).

All these defects are aggravated by Dr. Blum's occasional flirtation with the name-game. It is purposeful and rewarding to read his analysis of historic title situations; it is somewhat arid to discuss the propriety of names and it is erroneous to mistake the name predicated for the subject. Yet Dr. Blum frequently discounts alleged authorities in support of the doctrine of prescription on the ground that that name is not used (see pp. 20, 21 and 29) while at page 32 he takes the Judicial Committee to task for using it in the *Conception Bay* case (see also p. 61). That a particular term may have particular connotations deriving from a municipal law system is true, but that is irrelevant to the substantial question whether there is or is not a single doctrinal basis to historic titles.

Dr. Blum thinks that there is and his treatment of acquiescence is directed to this end. The rival contender is long-continued effective adverse possession, and Dr. Blum's opening salvoes are directed towards minimizing the significance of 'effective control' as an element in historic titles. We are told, at first, that the purpose of effective control 'rests completely in the field of evidence' being 'to raise the inference of other States' acquiescence' (pp. 102 and 129–30). Later, however, we are told that 'effective possession is vital for the formation of a territorial title' (p. 103). Does Dr. Blum maintain that effective control is merely a method of proving acquiescence alternative to, say, an uncontested paper claim? Apparently not, for at p. 106 he speaks of 'the paramount significance of the effectiveness of a territorial situation when contrasted with a purely abstract claim'.

The crunch issue therefore becomes whether title flows only from acquiescence in effective control, or whether it may also flow from the continued existence of such control for a lengthy period of time without more. It is at this point that the thesis is open to question. Dr. Blum is wholly committed to the exclusive relevance of acquiescence, but to subsume all the situations under this heading, he is obliged to resort to doctrines of constructive notice (pp. 144-7), inexcusable ignorance (pp. 147-52) and presumed acquiescence (pp. 172-7). Common and civil lawyers alike will recognize the ambivalence of these concepts—they may operate as presumptions of fact, in which case they do not disturb the acquiescence thesis; or they may operate as presumptions of law, in which case they do disturb that thesis. Unfortunately, the latter operation is not unknown to international law. We are told that 'the weight of opinion seems to be in favour of the presumption that States are aware of each other's legislative acts' (p. 148) and that a peculiar geographical configuration will lead to the ready presumption of acquiescence (pp. 174-5). Despite the assertion that in such situations it is 'the acquiescence of other states that sets the seal of legal validity' on claims, we are now describing a different rose by the same name and it doesn't smell as sweet. The strain on the argument reaches its peak at page 191 where we find 'continuity' equated with 'effectiveness' and 'peacefulness' equated with 'acquiescence'.

The situations are complex, but the question is a simple one. Can title only vest as the result of an actual assent by other States, (whether expressed in the form of recognition, or unexpressed as in acquiescence) as Dr. Blum maintains, or can it vest without such assent? Dr. Blum acknowledges that there are situations where there can be no assent because there is no knowledge and where, nevertheless, title will vest. The pity is that in stating such cases as instances of presumed (though not actual) acquiescence based on constructive (though not actual) knowledge, he has failed to carry through to the bitter end the ruthless analysis which makes this book in so many respects an excellent one.

HARRY CALVERT

The International Law Commission. By HERBERT W. BRIGGS. Ithaca, N.Y.: Cornell University Press, 1964. xv + 380 pp. £3.

The main reason for the greater degree of success attained by the United Nations, as compared with the League of Nations, in codifying international law, is to be found in the work of the International Law Commission. Professor Briggs's book, which is apparently the first monograph to be devoted to the I.L.C., therefore fills a big gap in the literature of international law. The book does not deal with the actual achievements of the I.L.C. (e.g. it does not analyse the Geneva Conventions on the Law of the Sea), but only with the way in which it works. Thus, Part I deals with the drafting and implementation of Article 13, 1 (a) of the Charter of the United Nations; Part II is an article by article commentary on the Statute of the Commission; and Part III, called 'The Commission in Action', deals specifically with procedures and methods, with the Annual Reports of the Commission and Dissenting Opinions, Recommendations of the Commission to the General Assembly, and the Commission's relations with the Sixth Committee of the General Assembly. Some of the procedural questions examined may seem unimportant at first sight, but experience shows how important procedure can be in ensuring the success of any corporate body, whether it be a Court, a Parliament, or a committee of administrators or scholars; and, by the same token, questions of procedure can give rise to bitter disputes between the parties concerned.

Overshadowing everything is the problem of the relationship between the I.L.C., on the one hand, and the General Assembly and the member States of the United Nations, on the other hand. The Soviet delegation, invoking the principle of State sovereignty, has been most persistent in trying to secure the subordination of the I.L.C. to the General Assembly and the member States (although the Soviet attitude seems to have mellowed recently, as a result of participation by Soviet jurists in the work of the I.L.C.); when one remembers the permanent anti-Soviet majority in the General Assembly during the formative years of the I.L.C., it is clear that the Soviet emphasis on State sovereignty was based not on expediency but on principle (or at least on a conditioned reflex). It was in an attempt to reach a compromise with the Soviet attitude that the General Assembly sought to make an unreal distinction between the codification and the progressive development of international law, with resulting distinctions between draft conventions, 'restatements' and other techniques of codification (or of progressive development, as the case may be). Long battles also took place between various United Nations organs concerning the I.L.C.'s meeting-place and rates of pay, thus demonstrating a favourite maxim of a certain member of the I.L.C.: *l'administration, c'est la guerre civile*.

While writing the book, the author was himself elected to the I.L.C. One feels that his present position, although increasing his knowledge of the I.L.C., has naturally and properly exercised a restraining influence on his writing. The book reads rather like the *Repertory of the Practice of United Nations Organs*, based on the records of public meetings of the I.L.C. and of other United Nations organs, and the author's personal comments are tantalizingly few. Consequently the book says little about the wider problems which have not been publicly discussed at the United Nations, such as the nomination of incompetent candidates by governments, the consequences of the fact that the terms of office of all members of the I.L.C. expire simultaneously, and the effect of increased membership on the quality of the I.L.C.'s work. All the same, the book has gathered together a lot of interesting information, provides much food for thought as well as accurate and extremely well organized information on what is after all one of the most important institutions in the history of the development of international law, and is written in a most clear and readable style.

The Statute of the Commission is printed as an appendix, and there is a good index.

MICHAEL AKEHURST

Private International Law. By G. C. CHESHIRE. 7th edition. London: Butterworth & Co., Ltd. 1965. lxi+628 pp. £3. 17s. 6d.

Restrictive practices are at present under a cloud of disapproval. That, however, is neither the chief nor the only reason why these words break an unspoken practice of almost twenty years' standing, one by which Professor Cheshire and the writer have refrained from reviewing each other's textbooks on private international law. The true reason for this breach is the writer's wish to thank this outstanding scholar for his help and inspiration in their common field of interest. It would suffice, indeed, for a review of Cheshire's work to recall that a year ago the University of London conferred on him its highest legal honour and thus expressed the opinion of one group of academic lawyers. It would suffice equally to observe that the seventh edition of any work calls for little more than an announcement of its appearance, and in a sense this is true of Cheshire's *Private International Law*. Yet the uniqueness of Cheshire's writing is its quality of constant freshness and intellectual resilience, so that the seventh edition, though more sophisticated and mature, is as fresh and stimulating as the first.

But just as this is a rare and welcome opportunity to pay high tribute to the work of a friend, so it offers an irresistible temptation to recall his unrepentant optimism on the doctrine of matrimonial domicile, equalled perhaps by the reviewer's obstinate refusal to revise (*inter alia*) his 'fundamental misconception' (p. 169) of the existence of a problem of capacity to acquire a domicile.

The chapter on Torts has been much revised, with the help of Mr. P. B. Carter, and it may be permissible accordingly to select it for one brief comment. Despite Professor Cheshire's general advocacy of the proper law concept, for example, in respect of the assignment of movables (p. 423), and his known preference for the objective view of proper law, he appears to disapprove of the extension of the idea to the field of tort. Thus he speaks (p. 253) of 'judicial flirtation with a notion akin to that of the proper law of the tort' occurring in the United States. This flirtation is being carried on by no less a body than the New York Court of Appeals.¹ The affair develops by Justice Fuld for that Court publicly embracing a view of the most significant relationship expressed by the Conflict of Laws Restatement, and concludes (prematurely, one must think) by a request to note the issue before the Court. What will the New York Court of Appeals do next? Yet even in contrast to this transatlantic approach the test of liability in tort preferred by the author (p. 257) is hard to accept. It is to refer to the law of the place of commission but to regard that place as any country which is substantially affected by the defendant's activity or its consequences, and the law of which is likely to have been in the reasonable contemplation of the parties. But one is bound to ask, is any law likely to have been in their contemplation under such circumstances? We read a little lower down that the purpose of resort to the *lex loci* is very largely to give effect to the presumed intentions of the parties, that the average man thinks in terms of internal law and it is therefore to the internal law rather than private international law that reference is made. The first proposition is difficult to accept; of the second it may be said that the average man may well not think in terms of law of any kind; and of the conclusion that, while reference is properly made to the internal law, it is not so made because of any intention, real or presumed, of the parties. Yet is not this line of reasoning a return to the proper law? The idea of the proper law in relation to tort must surely be the idea in its objective sense and in no way subjectively; even if, as is highly unlikely (except in cases of fraud), the parties have any legal system in contemplation when they commit a tort, such a state of mind, it is submitted, is completely irrelevant to liability or to the applicable law, since liability in tort, as in crime, does not depend upon the agreement or contemplation of the parties.

The new publishers have produced an excellent piece of work. On every ground we welcome this latest edition of Cheshire's *Private International Law*, and look forward to further editions from the author's distinguished and inimitable hand.

R. H. GRAVESON

Law Making by International Organizations. By Dr. INGRID DETTER. Stockholm: P. A. Norstadt & Söners Förlag, 1965. 353 pp. Kr. 42.

It has by now come to be fairly widely accepted that international organizations have a law-creating role. Although the result of many different activities, the idea of 'law making' seems to cover two main themes: the development of general international law, through custom, codification and treaty practice; and the development of the constitutional laws and powers of an international institution itself. Dr. Detter, in her book *Law Making by International Organizations*, is concerned with the second of these

¹ *Babcock v. Jackson*, 12 N.Y. 2d 473; 191 N.E. 2d 279 (1963).

themes, and indeed appears to see the study of those norms directly related to the competence of international organizations as the *only* possible meaning to be given to 'law making'. She explains in her preface that she seeks 'to establish what acts of international organizations contribute to the formation of international law'—a very broadly worded objective—whereas in fact her purpose is more correctly stated elsewhere as 'an attempt to analyse the techniques used by international organizations to bind their member States'. At the same time, Dr. Detter is making the assumption that 'the binding of States' and 'the making of law' is one and the same thing—an assumption with which this reviewer would agree, but which is more controversial than Dr. Detter would seem to realize. Sir Gerald Fitzmaurice, in his essay in *Symbolae Verzijl* and Dr. Skubiszewski, in *International Organization* (1964), pp. 800–3, for example, would not appear to share this view of the nature of law, and it is a pity that Dr. Detter has not spelled out both the arguments and her reasons for her own preference.

There is, in fact, a tendency general to the whole book for points to be made implicitly, rather than explicitly; for allusion to be preferred to definition. Dr. Detter makes her readers work very hard, but perhaps this is no bad thing. The author divides those acts of international institutions which come within the purview of her study into two categories, which she terms 'primary' and 'operative'. 'Primary acts' are defined as those related to the very mechanism of the organization; and 'operative acts' are those more closely connected with the aims of organizations. Her aim in respect of both categories is to examine the place of consent in the binding of States by international organizations. As she rightly observes, there has not previously been a major study directed to the question of how far the consensual basis of action by international bodies has become replaced by methods which more closely resemble national legislative processes. Dr. Detter shows that so far as 'primary rules' are concerned—that is to say, rules related to the administrative machinery of organizations—the requirement of continuing consent by sovereign members is in many cases more apparent than real. The organization frequently bases its authority to act, without further reference to its members for approval, upon a broad authorization given in advance in the constitution. Moreover, the doctrine of implied powers makes it unnecessary for the authorization to be explicit. Thus important day-to-day powers are left to organs which, even if plenary operate by majority vote, and if not plenary do not represent all States. States do not usually play any part in approving internal rules, such as those relating to staff matters; and Dr. Detter also shows that neither national ratification nor unanimous approval is required for certain primary acts, such as some financial or procedural rules, which have a direct bearing on the rights and duties of States.

The 'primary acts' which the author examines in order to reach these conclusions include rules of procedure, the establishment and granting of authority to subsidiary organs, staff rules, financial arrangements, and administrative agreements and implementing regulations. Dr. Detter's decision to attempt to draw conclusions holding true for *all* organizations (and not just for one or two preselected for special study) inevitably means that she casts her net very wide indeed. The reader is required, in the context of the role of consent in establishing subsidiary organs, to learn the lessons of U.N.E.F., O.N.U.C., the judgment of the Court of the European Coal and Steel Community in the *Meroni* case, and transfers of competence to the Administrative Commission of the E.E.C. It is no easy task, in compressing the necessary background information to these widely diverse studies, to delineate sharply those points relevant to the theme under discussion; and Dr. Detter does not always succeed. The pages on U.N.E.F. and O.N.U.C., for example, do contain, upon careful rereading, materials

germane to the question of State consent in the establishment and functioning of subsidiary organs, but the focus is very diffuse. One could wish, too, that Dr. Detter's decision to treat materials from the European Communities on the same juridical footing as those from the United Nations family, had been explicitly justified. The whole concept of State sovereignty in the Rome Treaty—and thus the relevance of continuing national consent to international decision making—necessarily differs from that in the United Nations Charter. To draw general rules across the board without any detailed comparison between organizations of the initial constitutional relationship between the institution and its members, is an approach which perhaps one may query. To say, for example, of the *Meroni* case, 'although cases before the Court of the European Communities deal with detailed technical questions related to the economic integration of the member States they *may nevertheless* contribute to the general theory of international organizations. In the case law of the Communities we find, for example, a case which lays down certain principles for the delegation of power *which may equally apply in other organizations*' (p. 81, italics mine) does not meet the objection.

The second half of the book concerns 'operative acts', and under this heading the author includes the treaty-making role of organizations and a composite chapter on various techniques whereby the requirement of express consent has been avoided. The treaty-making role of international institutions has already received a certain amount of scholarly attention,¹ and Dr. Detter's contribution here is to highlight what the evidence shows about State participation in the conclusion of treaties which may bind them as members of an organization. This is done in relation to the preparation and conclusion of general conventions, trusteeship agreements, contracts and technical assistance treaties.

It is for the admirable chapter on 'Relaxation of the Rules of Express Consent; Regulations of International Cooperation' that the reader will be most grateful, however, for this breaks new ground and contains a wealth of fascinating information. Dr. Detter has some extremely interesting observations to make on the relationship which evolved, in respect of the civilian operation in the Congo, between the United Nations and the Specialized Agencies. Although the relationship agreements between the Agencies on the one hand, and the United Nations on the other, may well have covered the arrangements which were made, the documentation reveals that the Secretariat appeared at times to be claiming a separate constitutional right to exercise authority over the Specialized Agencies.

Detailed consideration is also given to a range of techniques now incorporated in the practice of various organizations. Dr. Detter examines the so-called 'contracting-out' procedures of the U.P.U., as well as its five-yearly revision of the Acts of the Union. Certain revisions do not require unanimity, and so far as these are concerned the Organization may be said to be exercising a rudimentary 'law-making' power. The I.T.U. Regulations and concomitant safeguards are also scrutinized, and the scope and importance of the genuine 'contracting-out' procedure of the W.M.O., W.H.O. and I.C.A.O. are here analysed. Again, the passing of Sanitary Regulations by simple majority in the W.H.O. has to some extent found a natural counter-balance in the device of reservations. Dr. Detter looks in some detail at the practice of some States in entering reservations not as to substance—for the Sanitary Regulations are internationally binding from the moment of adoption by the W.H.O. Assembly—but as to their ability to promulgate the regulations internally without parliamentary or other domestic approval.

¹ Cf. a Note by Dr. Detter in this Year Book, 38 (1962), p. 421.

The author has undoubtedly drawn upon an impressive array of case studies from a very wide range of organizations, and has used them in a discriminating manner within her own framework of inquiry. The choice of materials has thus necessarily been selective, and the reader who is more familiar with the over-all practice of one particular organization than another may perhaps be forgiven for wondering a little about examples that were *not* chosen. But on the evidence here amassed Dr. Detter undoubtedly makes her case—so far as ‘primary’ rules are concerned, there is a considerable area of practice in which express consent is no longer required; in the case of ‘operative’ acts, on the other hand, there is a greater tendency by States to require certain formal safeguards. Even here, however, and especially in the case of the technical Agencies, the unilateral features of organizational action are often coming to assume a greater significance than the safeguard. The tightly argued final chapter draws together from the multitudinous examples in preceding pages some conclusions which are original, subtle and of very great interest to all students of international law.

ROSALYN HIGGINS

Civilians and the N.A.T.O. Status of Forces Agreement. By G. I. A. D. DRAPER, LL.M. Leyden: A. W. Sijthoff, Atlantic Series No. 4, 1966. iv+204 pp. Fl. 20.

Colonel Draper describes this monograph as a study of the exercise of criminal jurisdiction over dependants and members of the civilian component under the N.A.T.O. Status of Forces Agreement, 1951, which came into force in August 1954, and to which, under the terms of the Supplementary Agreement regarding Foreign Forces stationed in the Federal Republic of Germany, 1959, that country became a party in July 1963.

Article VII of the main Agreement avoids the problem whether and to what extent visiting forces are immune from the jurisdiction of a host State, and adopts a pragmatic approach. The criterion for jurisdiction is subjection to the military law of the sending State, and the agreement creates a system of priorities for the exercise (by sending States and receiving States), of criminal jurisdiction over attached civilians and dependants. Under paragraph 3 the competing claims of concurrent jurisdictions exercisable in one State are sought to be resolved by a system of primary rights, whereby the military authorities of the sending State are given priority as regards the prosecution of offences against the property or security of that State, offences against the person or property of members of its force, civilian component or dependant, and ‘on duty’ offences.

The system of ‘primary right’ is modified by provision for waiver. Thus, under paragraph 3 ‘. . . the authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance’.

Under paragraph 2, persons subject to the military law of the sending State are placed under the exclusive jurisdiction of that State as regards acts which constitute offences against the law of that State but which do not contravene the law of the receiving State. Reciprocally, acts punishable by the law of the latter, but not by that of the former, are placed under the exclusive jurisdiction of the receiving State.

It will be appreciated that the United States was from the beginning the most important sending State in terms of the number of its forces and camp followers based abroad. In 1959 almost 17,000 civilian employees and over a third of a million

dependants were maintained in the N.A.T.O. area of whom 186,000 were stationed in Germany, which was not at that time a party to the Agreement. There were in the United Kingdom some 38,000 United States dependants. Between 1954 and 1958 some 5,000 criminal cases were dealt with which involved United States civilians subject to the receiving State's 'primary right'. Of these, there was one case of murder, three of rape and thirty-two of manslaughter; most of the latter cases arose out of the driving of motor-cars, as indeed did the overwhelming majority of the residual 4,970.

No figures of the United Kingdom civilians and dependants based abroad are supplied, but it is indicated that in the eighteen months from January 1957 to July 1958 the United Kingdom military authorities in the Federal Republic of Germany dealt with some twenty offences, most of which related to 'shoplifting' in service shops by wives of servicemen; there was one case of homicide and one of assault.

The number of civilians purported to be subject to the jurisdictional arrangements of the 1951 Agreement as supplemented by the Supplementary Agreement of 1959 is clearly not large, and neither the crime figures nor the analysis of typical offences give cause for gloom.

The means adopted to resolve the jurisdictional problems, though ingenious, are not intellectually exciting. Nor do the questions which the Agreement purports to answer occupy the foreground of the consciousness of most international lawyers. There is no outstanding social or political problem raised or resolved here such as to attract the attention of those who concern themselves with pressing issues of civil liberties. The author confesses that the conclusions reached are meagre in relation to the corpus of the study. More arcane topics than this one may have been canvassed in the journals, but rarely nowadays are they treated at such length as in the work under review. What, it might be asked, is the justification for such treatment?

Colonel Draper acknowledges the force of such initial doubts, for in an introductory chapter he lists a series of grounds on which such a study may be justified. First it is said that Article VII is of interest and importance in that it provides a relatively novel scheme of jurisdictional arrangements, not grounded in previous State practice, nor found in previous bilateral or multilateral treaties, and paying little attention to the doctrinal expositions of jurists. Secondly, Article VII has provided a model for a large number of other jurisdictional arrangements for visiting forces operating outside the framework of the North Atlantic Treaty. Thirdly, there is the intrinsic merit of the scheme of Article VII in abandoning the idea of conditional immunity from jurisdiction in favour of a pragmatic system of priorities. In addition, the consideration of the exercise of criminal jurisdiction over civilians as a distinct aspect of the operation of the Agreement is rendered necessary on a number of grounds; that this is the pioneer example of a multilateral treaty, designed to govern the status of visiting forces, that has extended its jurisdictional provisions over certain classes of civilians; that the number of persons affected by this provision is substantial; the indispensability in peace-time of the presence of employed civilians and dependants alongside the members of the armed forces; and the context of jurisdiction over civilians has provided the one serious obstacle to the operation of the Agreement according to its tenor and the intention of those who framed it.

Without necessarily conceding the validity of all the author's points, it must be admitted that Colonel Draper's last-enumerated head of justification is sufficient in itself to disarm criticism.

This is an exhaustive study. The reader is presented with the background to the Agreement and to Article VII; a rigorous analysis of that Article; chapters on the experience

of the United Kingdom and the United States as sending States and receiving States; on the relationship between the European Convention for the Protection of Human Rights, 1951, and Article VII; on the criminal jurisdiction over civilians under the Bilateral Agreements between the Warsaw Pact powers; and on the effect of the Supplementary Agreement of 1959. But though exhaustive, this is not an exhausting book, for it touches at many points upon interesting problems of international law, of comparative and constitutional law, on jurisprudence and military law, and the author has a good story to tell.

At the heart of the study is placed a highly interesting account of the decisions handed down by the Supreme Court of the United States between 1956 and 1960 which were to remove the foundations upon which the United States had negotiated the Treaty. The subsequent operation of Article VII, in a manner diametrically opposed to that for which the framers had worked, appears in the light of hindsight to vitiate the reasoning which clearly buttressed the arguments of the United States negotiators.

While joining the author in paying tribute to the flexibility of an arrangement which continues successfully to operate in such unforeseen circumstances, one is conscious of a splendid irony in the situation, and one, moreover, which does not stand alone in the negotiation, drafting and operation of this pioneering and pragmatist piece of treaty-making.

It appears that the United States authorities assumed throughout the negotiation of the 1951 Agreement that civilian employees and dependants accompanying American forces overseas in time of peace were subject to the military law of the United States of America.

Indeed, in the discussions leading up to the Eden-Winant Exchange of 1942 whereby the total immunity of such persons from prosecution in the courts of the United Kingdom was sought and granted, it was argued that the United States Constitution guaranteed their exclusive subjection to the United States Articles of War, the then governing code of military law. In contrast to what had been secured in the Anglo-American negotiation of 1942, the United States proposals for the 1951 Treaty merely sought exclusive military jurisdiction of the sending State in respect of offences directed solely against the property and security of that State and against the person or property of a member of the contingent (including attached civilians) or of a dependant. This proposal was resisted by the United Kingdom, and the above offences were placed within the ambit of the scheme of concurrent jurisdiction and sending State primary right. The United Kingdom took advantage of the Agreement in subjecting its own accompanying civilians and dependants to military jurisdiction by the Army Act 1955.

As regards the offences falling within the primary right of the receiving State, it would appear that in the period 1954-8 the waiver rate ran at about 80 per cent. Despite the existence of some doubt as to whether the 'primary right' provisions of paragraph 3 extended to dependants, it appears that the United States authorities formerly sought waiver in respect of members of that class. Colonel Draper suggests that United States policy has been to seek waiver in all cases where there was a concurrence of jurisdiction as well as in cases where the Agreement does not clearly provide for such waiver. He stresses that 'as a matter of official policy, waiver was sought in every case in which the receiving State had the primary right to exercise jurisdiction', and somewhat sharply he observes that 'it is difficult to justify this policy, which does not seem to conform with either the letter or the spirit of the Agreement'.

What this amounts to, of course, is that baulked in their attempt to secure exclusive jurisdiction with respect to paragraph 3 (a) offences, the United States authorities

reverted, with the consent, be it noted, of receiving States, to a practice falling little short of that which the United States of America (Visiting Forces) Act 1942, implementing the Eden-Winant Exchange, had regulated.

In the circumstances it is difficult to resist the conclusion that the author's suggestion that the Article VII system 'commends itself whenever the sending State is anxious to find a reasonable and effective compromise that will not offend strict conceptions of State sovereignty and national prestige' is rather understated. Well may Colonel Draper point out that the success of such agreements depends upon 'tolerance and restraint in not insisting on the full measure of rights and privileges flowing in favour of one or the other Party in any particular case'.

No doubt the American authorities were motivated by a concern that their forces and camp followers should enjoy all their constitutional rights and safeguards. No doubt the service commanders were in complete good faith when in 1957 they gave it as their clear opinion that 'discipline would be disrupted, morale impaired, and ability to perform the assigned mission reduced' if military jurisdiction over civilians were denied. The irony is that in a line of decisions delivered in the four years ending in 1960 the Supreme Court declared unconstitutional the military jurisdiction over civilians. In the result all United States civilian employees and dependants stationed on overseas bases have been since 1960 subject to the exclusive jurisdiction of receiving States, whereafter, as the author notes, 'little complaint has been heard about the discipline, morale and efficiency of these bases'.

It would, of course, be improper to speculate as to whether the United States authorities feel that subsequent to 1960 the provisions of Article VII paragraph 3, in so far as they relate to civilians, might, from the point of view of the United States of America, never have been drafted.

Colonel Draper's analytic skills are matched by his narrative talents. Properly adopting a chronological order of exposition, he is enabled to save his sweetest morsel, to mix a metaphor, to the end. Thus in 1963 the Federal Republic of Germany became a party by accession to the 1951 Agreement as modified by the terms of the Supplementary Agreement of 1959. Article 19 of the latter Agreement modifies in an important respect the system of waiver of Article VII, paragraph 3 (c) of the former Agreement. The Federal Republic at the request of a sending State, is required to waive its primary right under paragraph 3 (b) of Article VII, which provides that in the case of 'any other offence' (i.e. those not specified in paragraph 3 (a) as relating to the security or property of the sending State, or to the persons or property of its forces, or attached civilians) the primary right to exercise jurisdiction shall reside in the receiving State. Article 19 (1) of the Supplementary Agreement operates to deprive the Federal Republic of that residuary primary right if a request is made by a sending State at the time of the entering into force of this Agreement. The United Kingdom also took advantage of that provision. The position of the Federal Republic is alleviated by the fact that dependants probably do not fall within the primary-right provisions, and that the waiver can in certain situations be withdrawn.

Doubtless Article 19 was a small price for the Federal Republic to pay for the advantages of adhesion to N.A.T.O. The author phrases his conclusion on the effect of this Agreement with his usual masterly understatement. 'The Supplementary Agreement', he writes, 'has steered the middle course between the unadjusted application of the Agreement to the Federal Republic as a receiving State and the need to take into account the legacy of the former status of foreign forces in Germany stemming from the occupation regime.'

ADRIAN TAYLOR

The Conflict of Laws. By R. H. GRAVESON. 5th edition. London: Sweet & Maxwell Ltd., 1965. xxx+593 pp. £3. 3s.

With a flash of insight, the fifth edition of this book has been sent to be reviewed by one not especially learned in the conflict of laws. This, it is submitted, is the right thing, because, once the scholarship of previous editions of a students' textbook has been recognized, a non-expert's review can be useful for assessing the book's value to the less learned reader.

The non-expert looks for adequacy in area and depth, clarity of exposition and general readability. Professor Graveson's book passes these tests with flying colours, for which humble students will be grateful.

The law is now stated as at June 1965 and there has been some rearrangement. If the reviewer may be permitted a minor sally into Professor Graveson's territory, he may perhaps suggest that the statement on page 512 that the Chicago Convention 'may be brought into effect in England by the Civil Aviation Act 1949' should be reconsidered in the next edition, bearing in mind that the Convention was ratified by the United Kingdom on 1 March 1947, and has been given effect to by a series of Air Navigation Orders and Regulations, made under section 8 of the 1949 Act.

ARNOLD KEAN

Théorie de la paix selon Pie XII. By GERARD HERBERICHS, with preface by Professor Charles de Visscher. Paris: Éditions A. Pedone, 1964. xi+248 pp. (Bibliography but no Index.) Price not stated.

In the tradition of Lord Clonmore's *Pope Pius XI and World Peace* (1938) and Guido Gonella's *Papacy and World Peace* (edited by Professor Beales and Archbishop Beck, 1945), this work is an attempt to enunciate the theory of world peace which guided the late Pope Pius XII. The work is all the more interesting because of the controversy which has surrounded Pius XII.

In his preface Professor de Visscher recalls the Pope's reprobation of totalitarianism in his first Encyclical letter, *Summi Pontificatus*, of 20 October 1939, just after the outbreak of war. The line of thought, he says, continued in more and more explicit statements, right up to the last in the message of Christmas 1957. In the message of Christmas 1943 Pius XII had said: 'Peace . . . is a moral and legal action.' It is not just the absence of war and it is certainly not, as the anarchists affirm, the absence of law. M. Herberichs (p. 9) recalls indeed that the motto chosen by Pius XII was from Isaiah, *Opus justitiae pax*. Justice of course involves balancing interests, but a balance of power is not the same thing. Kant and Redslob have pointed out that that which is 'just balanced' is soon upset (p. 14). Herberichs quotes Harold Laski's phrase (p. 19) that 'the spiritual life of Europe belongs not to Caesar and Napoleon but to Christ'. Peace is indeed a metaphysical or spiritual problem (p. 20); it is the *tranquillitas ordinis* of Pius XII, it transcends narrow nationalism (p. 38). It is no use saying 'my country right or wrong'.

Pius XII could render homage to Ghandi (p. 40) for putting spiritual things first, but he was not impressed by a pacifism which renounced faith in God (p. 48), i.e. in the ultimate notion of Goodness as the aim and end of all things. Armaments had an importance that was relative and secondary to the conception of peace (p. 49). The moral, or natural, law is not compatible with totalitarian legislation (p. 70), nor with basic human values that transcend nationality (p. 126). Indeed, peace is an individual responsibility of every man (p. 137), said Pius XII, and, as Suarez pointed out, in the

celebrated and often quoted passage from *De Legibus*, mankind, though divided into different peoples and States, does form a unity, and there is in fact a supra-national society (pp. 158-9).

For this society Pius XII, at the time of the Dumbarton Oaks discussions on the future of the United Nations, wanted to see a Federal authority (p. 162) which could intervene legally against the immorality of aggression (p. 163). This has not effectively come about yet, but there is hope of a United Europe today, and Pius XII gave this his 'almost unconditional approval' (p. 188) but, as the author observes, the rejection of the United Kingdom's application to join the Six shows that it is not yet proved that the Six will certainly lead to a wider unity (p. 188).

Public opinion is essential for international organization (p. 192), but it must be founded on true facts (p. 215), and not the selfish convenience of parties or nations (p. 216). Ignorance is the great danger (p. 228). The realization of a community of interests, even in a world of conflicting sovereigns, is the hope for the future, according to the author (p. 232). He concludes that theories of peace and international organization help us to understand reality, and also to define an ideal so as not to be complacent with the present (p. 233). The practical value of theories, like those of Pius XII, 'ressemble à celle du droit naturel qui ne vaut rien en soi mais dont la fonction est infiniment importante'.

The work is scholarly and complete, and concludes with an *Annexe* setting out documents concerning Pius XII and Nazism in the period 1939 to 1946. That of Christmas 1942 was particularly telling when it spoke of those condemned to extinction without any fault on their part, and merely because of race or nationality (p. 238).

B. A. WORTLEY

Principles of International Law. By HANS Kelsen. 2nd edition revised and edited by Robert Tucker. New York: Holt, Rinehart & Winston, 1966. xvii+602 pp. (including Index). \$9.95 or £4.

A knowledge of Hans Kelsen's writings and an understanding of his legal philosophy are essential to every international lawyer. The scale of Kelsen's contribution to international order may be measured by the influence of his views in the fields of legal and political philosophy, sociology, constitutional law, international law and administrative law. So significant has been this contribution that he is studied and admired as much by those who disagree with him as by those who are disciples. It is no coincidence, for example, that the *Festschrift: Law, State, and International Legal Order*, published in 1964, includes scholarly and affectionate essays by a cluster of people whose legal philosophy is hardly Kelsenian.

Whether as a foundation stone, or as an intellectual structure against which to measure the strength of opposing ideas, Kelsen's pure theory of law and all the literature that has flowed from it, remain of major importance.

A second, revised edition of Kelsen's *Principles of International Law* is thus extremely welcome. The task of editing and revising this work to include materials and developments since 1952 has been undertaken by Professor Tucker. Professor Tucker's intellectual sympathy with Kelsenian theory is apparent (though curiously, he was not among the contributors to the 1964 *Festschrift*) and the basic flavour of the earlier edition has been successfully retained. This can have been no easy task when the present edition is half as long again as the first edition.

Professor Tucker has by and large limited the text to statements of legal principle,

reserving to the footnotes a discussion of those case materials which support the points being advanced. While this may not be an elegant method of arrangement, in the opinion of this reviewer it is justified as a means of retaining the distinctive qualities of the original edition.

It is interesting to see what Professor Tucker has done with the use of force. The central philosophy remains: a legal obligation exists 'only if a sanction is provided as a reaction against the contrary behaviour—and a sanction implies the admissibility of employing, if necessary, physical force'. Because the Charter has limited the use of 'sanctions' to responses to a very circumscribed group of obligations, 'the Charter has the effect of depriving of their legal character all obligations established by general international law which are not at the same time obligations under the Charter' (p. 51). One wonders at the significance of the deletion of the word 'undesirable' from the first edition, which stated: 'the Charter has the *undesirable* effect of depriving . . . under the Charter' (p. 58, ed. of 1952). Be that as it may, in an expanded section Professor Tucker deals with the problems raised by the peace-keeping role of the Assembly, and after recounting the constitutional arguments on both sides, comes down fairly firmly in favour of the legal validity of Assembly 'policing actions', basing himself on very much the same grounds as the International Court of Justice used in relation to the question of costs of General Assembly's peace-keeping in the *Expenses* case. The non-obligatory, consensual basis of such Assembly action satisfies Professor Tucker; but he also accepts that even so, the Assembly still has the authority to exact a legal obligation in respect of peace-keeping so far as contributions to finance are concerned. One may well agree—but is this really Kelsenian?

A slight departure from Kelsen may be seen in one or two points in the rewritten and enlarged section on self-defence and self-help. Kelsen's view that the wording of Article 51 makes it illegal for members to assist non-member victims of armed attacks, finds no place in the new edition. The earlier edition did not deal with the question of 'anticipatory' self-defence, but in recounting the various arguments that have been advanced on this question, the editor appears to reject, albeit very cautiously, the restrictive view that an armed attack must actually have begun before the right of self-defence is available. At the same time, he quite rightly contends that one can only agree to the flexible interpretation in respect of imminent, rather than actual attacks, if the machinery for subsequent impartial review by the Security Council operates well. And there is little cause for complacency here.

One may be especially grateful to Professor Tucker for his new 100 pages on the conduct of war, which bear the mark of personal authority that one would expect. Further, the new edition contains an examination of the effect of the 1961 and 1963 Vienna Conventions on the law of extraterritoriality. More controversial is the new section on effectiveness—effectiveness, that is, of various national acts upon the international legal order. This includes, but goes beyond, an examination of whether legally valid claims can emanate from illegal actions. Professor Tucker is concerned with effectiveness as 'a rule of positive law'. He advances the proposition that normally the validity of a rule does not depend upon its effectiveness (he does not explain what precisely he has in mind when using the terms 'normally' or 'effectiveness'); that none the less a legal system may contain a rule whose content stipulates that if, after a certain period of time, a rule is by and large ineffective it is no longer valid; and that the principle of effectiveness, as a rule of positive law, determines the validity only of conventional, but not of customary law. Out of all the additions and revisions, it is in these tightly argued pages that Professor Tucker most clearly shows his intellectual affinity to

Kelsen's approach. Some readers may find plenty here from which they may wish to dissent, but this essay undoubtedly has a proper place in this book.

The new section on custom is not thorough or comprehensive enough to be really satisfactory—too many aspects are not covered, and too many difficulties only alluded to. But there can be no doubt that Professor Tucker has admirably succeeded in his task of providing us with an up-to-date *Kelsen's Principles*, and we are in his debt.

ROSALYN HIGGINS

The Legal Effects of War. 4th edition. By LORD McNAIR, C.B.E., Q.C., LL.D., F.B.A., and A. D. WATTS, M.A., LL.B. of Gray's Inn, Barrister-at-law. Cambridge University Press, 1966. xlix+468 pp. (including Index). £7. 7s.

The Vice-Chancellor of Liverpool University, welcoming the Lord Chancellor in an after-dinner speech, recently reminded us that there are only three ages of man: youth, middle-age and 'you're looking very well'. Some of us may snatch eagerly at the straw and be happy to agree that we are indeed looking very well, but Lord McNair, himself once a Vice-Chancellor of the University, has so triumphantly remained in the second age that it would be an impertinence to make the remark that could assign him to the third. Yet it is a matter of record that Dr. McNair's *Essays and Lectures upon some Legal Effects of War* were published in 1920, four of the chapters having already appeared in the journals; that Sir Arnold McNair's *Legal Effects of War* came in 1944 and again in 1948; and that Lord McNair's and Mr. Watts's new edition is now before us more than half a century after the appearance of 'Alien Enemy Litigants' in the *Law Quarterly Review*. Some of those who were privileged over two years ago to join in the celebration in Cambridge of Lord McNair's eightieth birthday may or may not survive to enjoy editions of the *Legal Effects of War* produced when Lord McNair has outdone Williston in longevity. What is certain is that those editions will continue to demonstrate the qualities to which reviewers of earlier editions have paid such sincere tribute—cool detachment, selective perceptiveness, balanced judgment and compact lucidity of expression.

The original edition consisted of 168 pages of collected essays and lectures. The second edition was described by the late Sir Hersch Lauterpacht as 'a comprehensive and systematic treatise which, it may be safely predicted, will become a classic'. This prediction has been indisputably fulfilled.

The opening chapter of the 1966 edition has the title 'War and Other Armed Conflicts' as distinct from 'What is War?' in earlier editions. After quoting Sir John Harington on treason, the authors remind us that: "Today the term 'war' is out of fashion. Resort to armed force is widespread and constant but none dare call it 'war' . . . if the practice continues, a new body of law will emerge governing armed conflict falling short of 'war' either in breach or in pursuance of the Charter of the United Nations or otherwise." The rough-and-tumble common lawyer, with memories of Korea, Suez, Cuba and Indo-Pakistan, and with awareness of Vietnam, will welcome this approach. He is primarily concerned with the effects in English law of various activities and situations and is content to leave the appropriate labelling to the international lawyers, though he hopes that their tongues are firmly in their cheeks when they speak of the 'various unique characteristics' of the naval 'quarantine' of Cuba and the adaptation of the notion of sanitary quarantine, with its prophylactic elements, so as to take into account the difference between infectious diseases and nuclear attack.

As in earlier editions, but with skilful addition and amendment, the other chapters deal with contracts in general and frustration in particular, carriage of goods by sea, agency, employment, partnership, companies, insurance, landlord and tenant, sale of goods and other matters affected by war. The authors draw particular attention to their chapters on 'Effects of Belligerent Occupation of Territory', 'Acts of Governments Dispossessed by Belligerent Occupation' and 'When the United Kingdom is Neutral'.

In 1948 the conclusion reached after an examination of the theories underlying frustration was: 'There can now be no doubt that the balance of judicial authority is in favour of the implied term as the basis of the doctrine of frustration, and history appears to be on that side.' In 1966 Lord McNair is unrepentant and Mr. Watts joins with him: the only modification is in emphasis. The proposition on which it was felt there could be no doubt now becomes 'our submission'. Of course, in *The Eugenia*, [1964] 2 Q.B. 226, 238, Lord Denning said: '. . . the theory of an implied term has now been discarded by everyone, or nearly everyone, for the simple reason that it does not represent the truth'. Certainly not everyone, and perhaps not nearly everyone, and perhaps as Lord Radcliffe has said: 'so long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed'. But the firm approach in the chapter on frustration, and the historical survey, continue to be most welcome to the common lawyer.

The Suez cases from *Carapanayoti* to *The Eugenia* are concisely and incisively considered and a five-point estimate is made of their contribution to the doctrine of frustration. The fifth point made is: 'The element of unexpectedness must not be overlooked, in the sense that it is very difficult for a person to allege and prove frustration by an event which was, if not imminent, at least capable of being foreseen by persons of his profession or occupation and for which he made no provision in the contract alleged to be frustrated.' This again is welcome for too much emphasis has, perhaps, been placed on the decision in *W. J. Tatem Ltd. v. Gamboa*, [1939] 1 K.B. 132, and on Lord Denning's *dictum* in *The Eugenia*: 'It has frequently been said that the doctrine of frustration only applies when the new situation is "unforeseen" or "unexpected" or "uncontemplated" as if that were an essential feature. But it is not so. The only thing that is essential is that the parties should have made no provision for it in their contract.'

Much work has gone into this new edition of an established classic. Much has been amended and much incorporated, all with such adroitness that the text is increased by only seven pages. The book is splendidly produced by the Cambridge University Press but the increase in price from 25s. to £7. 7s. is in itself a devastating comment on the economic effects of war and of post-war activities.

F. J. ODGERS

Traité de droit aérien-aéronautique. By NICOLAS M. MATTE. 2nd edition. Paris: Éditions A. Pedone, 1964. 1021 pp. 100 Fr.

This is the second edition of a large treatise on air law by a Professor at the University of Montreal. Despite its title, the book deals only with the international aspects of air law, principally with multilateral conventions. Of the 1,021 pages, 329 are devoted to the French texts of conventions and even of draft conventions, some of which are now only of historical interest. There is also a selection of texts relating to I.A.T.A., and a bibliography, but no index.

The method is mostly one of description rather than analysis, and the book is likely to be of value to French-speaking beginners in the field, for whom it could provide a useful textbook in the transatlantic tradition.

ARNOLD KEAN

Organisations européennes. Vol. 1. By W. J. GANSHOF VAN DER MEERSCH. Brussels: Émile Bruylant; Paris: Sirey, 1966. 580 pp. 140 Fr.

The study of the law of European organizations—the ‘constitutional law of European institutions’—has developed tremendously over the last decade. Two books on the subject were published in English in 1959. In French, several authors have followed suit. The first book was that of Professor Pinto in 1963 (2nd edition, 1965); then came Professor Reuter’s manual in 1965 and Professor Cartou’s ‘Précis’ in the same year, with a second edition in 1967. Professor Ganshof van der Meersch’s work will be in two volumes, of which the first was published in 1966 and is the subject of this review.

Professor at the Law Faculty in the University of Brussels and President of the Institute of European Studies, where he has secured the participation, and published the contributions, of many of the leading figures of the European organizations, Professor Ganshof van der Meersch deals in his first volume with the intergovernmental organizations; the second will be devoted to the European Communities. This division of the subject-matter makes it possible to deal with the first category much more thoroughly than has been done by any of his predecessors.

In a short Introduction he analyses briefly the new concepts of public law involved in the Community system, which were first known as ‘supranational’—a word which now seems sufficient ‘pour attirer et aviver les réactions les plus radicales du nationalisme dont il est toujours aisé de faire vibrer la corde au cœur des hommes’; he comes to the conclusion that their institutions are better described as ‘pre-federal’. A short chapter on the notion of ‘Europe’ in ‘European Organizations’ includes a useful table of membership of the various organizations to be discussed.

The Economic Commission for Europe of the United Nations is taken as the point of departure for Book II, which goes on to deal with the organizations dealing with transport and scientific co-operation. The former category includes the Rhine Commission and the new Moselle Commission (pp. 61–70), the Conference of Ministers of Transport (pp. 71–75) and EUROCONTROL, another new technical agency of which little is known except by specialists (pp. 76–83). Perhaps the European Civil Aviation Conference would merit a short chapter in this part of the book, rather than the mere footnote which it is accorded in a later chapter (p. 240). The section on the scientific organizations covers those dealing with nuclear research (C.E.R.N.—pp. 85–91) and space research (E.S.R.O and E.L.D.O—pp. 92–101).

Book III is valuable in dealing with ‘Les Organisations des états de droit socialiste’, that is to say COMECON and the Warsaw Pact (pp. 105–38) about which little material has been published in Western Europe. It is particularly useful that the chapter on COMECON covers not only the institutional structure of this organization and of the International Bank for Economic Co-operation, but also the problems which have arisen from the attitudes adopted in recent years by Albania, Yugoslavia and Roumania.

Book IV constitutes much the longest part of the work and deals with the Western European organizations, covering successively those of a military character (the Brussels Treaty, W.E.U., N.A.T.O. and the E.D.C.—pp. 149–95), the Council of Europe (pp. 197–403), the Nordic Council (pp. 403–15), and the economic organizations (the union of Belgium and Luxembourg, Benelux, O.E.E.C., O.E.C.D., and E.F.T.A.—pp. 416–522).

The comprehensive nature of this work will be apparent from this recapitulation of its contents. The long section of more than 200 pages on the Council of Europe is the more welcome by reason of the summary treatment accorded to it by other authors. (Cartou devotes 14 pages to the Council and Reuter 25; Pinto allows it 120 pages, but

115 of them are devoted to the Convention on Human Rights.) As a result, Ganshof van der Meersch's account of the structure and functioning of the Council of Europe is one of the most complete that may be found and certainly the most up to date. Separate chapters deal, among other things, with the statute, the aim of the Council, its competence, composition and organs and the conventions and agreements which it has concluded. There are now over fifty of these; thirty-eight had entered into force by the end of 1965 and are described here; a useful table of ratifications is appended. This thorough treatment is to be warmly welcomed. The author is particularly informative on the subject of the Convention on Human Rights (pp. 247-375) with regard to which he not only explains the role and functioning of the Commission and the Court and the more important cases with which they have dealt, but also the problems arising out of the direct application of the Convention in certain countries in their internal law (pp. 348-75), on some aspects of which he delivered a masterly paper at the Vienna Colloquy on the Convention on Human Rights in November 1965, the proceedings of which are shortly to be published.

One matter with regard to which the present reviewer would venture to differ from the learned author relates to the composition of the Committee of Ministers of the Council of Europe (pp. 225-9). The foreign ministers themselves can attend but once or twice a year; as a result, they are replaced at most of the meetings of the Committee by the permanent representatives who are known as 'the Ministers' Deputies' (in French 'les Délégués des Ministres'). But these diplomatic representatives are not the 'alternates' referred to in Article 14 of the Statute, because these alternates are, whenever possible, to be ministers in the national governments, whereas the Ministers' Deputies are never of this rank. Their position and status are therefore derived not from the Statute but from constant practice based on a decision taken by the Foreign Ministers in March 1952. Another matter calling for comment is the procedure for the opening of conventions for signature. While it has been the practice, as the author states (pp. 228, 246), to hold that the decision to open a convention for signature amounts to a recommendation to the governments to sign it and therefore requires unanimity under Article 20 (a) of the Statute, the better view (in this reviewer's opinion) is that such a decision is of a procedural nature and can therefore be taken by a simple majority under Article 20 (b). Even if this is not so, it is submitted that such a decision is one of the 'other matters' referred to in paragraph (d) of Article 20 of the Statute, which can therefore be decided by a two-thirds majority. This question has more than a theoretical importance, because the fate of many a draft convention may depend on the answer given to it. The late Mr. Ernest Bevin stated that he did not wish the Council of Europe to be hamstrung by the veto; a liberalization of the practice followed in this matter would certainly facilitate the work of the Council of Europe in the conclusion of European conventions, which Professor Ganshof van der Meersch rightly describes as the most important tangible result of an organization which constitutes 'le seul cadre organique d'une conférence générale permanente des États d'Europe. Il est surtout . . . le laboratoire où s'élaborent . . . des conventions multilatérales qui, lentement sans doute mais efficacement . . . contribuent remarquablement à l'édification d'un droit européen'.

The treatment of the Council of Europe in this work has been particularly singled out in this review on account of the importance attached to it by the author and the comparative lack of adequate treatment of the subject elsewhere. This is not to imply, however, that the other European organizations are not dealt with fully and in a stimulating manner in their respective chapters. Indeed, we may be grateful to the

author for the best and most comprehensive work yet published about European organizations; and we may await with impatience and with confidence his second volume on the European Communities.

A. H. ROBERTSON

The Sources and Evidences of International Law. By CLIVE PARRY. Manchester University Press, 1965; New York: Oceana Publications, 1965. vii + 122 pp. 25s.

Recent fashions in the literature of international law have emphasized new subject-matter and new terminologies at the expense of the more classical and central institutions of the law. Yet it is surely impossible to examine subjects relating, for example, to activities in space, or to international organizations, without a proper understanding of the arithmetic of the law, constituted by existing rules as to territorial sovereignty, sources of law, jurisdiction, nationality and so on. Unfortunately too much recent research, particularly in the United States, assumes that novelty and a choice of an 'up-to-date' and 'sociological' terminology excuse sloppiness of thought and the avoidance of 'technical' problems. A contrast to such productions are the Melland Schill lectures at the University of Manchester, which allow for a vigorous re-examination of central areas of the law and a treatment uncluttered by exhaustive citation of evidence and the more incisive because there is no need to be 'comprehensive'. Professor Jennings, in another volume in this series, has shown that acquisition of territory is by no means an exhausted subject, and Dr. Parry has now taken up another basic topic and turned it inside out for better inspection. The general object of the inquiry is to elucidate rather than to present a neat set of conclusions. Dr. Parry takes Article 38 of the Statute of the International Court as his text and examines the content from the view not of the Court but of the State. He avoids working from conventional and facile assumptions and refuses to accept the view that international tribunals are necessarily wiser and more in step with the times than governments. The freshness of his approach and his analytical progress through paradox and a nicely constructive perversity ensure the elucidation which is his object, though the texture of the book does not always make for easy reading.

The substance of the book is devoted to an examination of the sources listed in Article 38 of the Statute of the Court. In Chapter II Dr. Parry considers the treaty as a source and relates the function of treaties to the general structure of international law. He establishes that treaty is the analogue of contract rather than statute and distinguishes the treaty as a source of law from the treaty as a source of obligation under the law. The opinion is offered 'that despite the primacy of treaty over customary international law in any particular regard, the proportional contribution of treaties to the whole stuff and content of the international legal system, even allowing for the area of customary law codified and restated by treaty, is relatively small. The treaty is, in truth, essentially peripheral'. What is said in the course of developing this view is interesting in detail but is founded on unsafe assumptions. In the first place (and this is inherent in his own discussion of custom later) there is a complex but definite relation between, on the one hand, the 'contractual' or specific obligation between States arising under treaty and from acquiescence or protest in relation to 'custom', and, on the other hand, the '*opinio juris*', or law-making element, in State conduct. Secondly, using Dr. Parry's approach through the attitude of States to these things, the evidence would

seem to indicate a preference by governments for treaties and a desire to keep the legal and diplomatic membranes in contact by means of the treaty form. The third chapter, on custom, deals briefly with the 'elements of custom' and places the relevant pronouncements of the Court carefully in context. Its bulk, however, is concerned with proof of State practice with particular reference to the availability of materials and the French and British *Digests*. Chapter IV, entitled 'The Remaining Sources', continues with the removal of the topsoil of convention. In particular, the writer points out (a) that 'general principles of law' is a term which may be used in significantly different ways; (b) that the function of Article 38 (1) (c) of the Statute of the Court has not been as it was intended by the draftsman; and (c) the possibility that the items assigned to this category could, with less confusion, be placed in other categories and that the general principles should have the status of a method rather than a source.

In his discussion of judicial decisions, Dr. Parry makes a digression (pp. 101-3) of considerable interest. He suggests that States interact on more than one 'legal' plane: there is thus a secondary pattern of curial jurisdictions (or interacting 'internal' legal systems) in addition to the more obvious pattern of 'States', i.e. of legislative-executive complexes. Possible consequences for the study of the sources include the relevance to international law not only of decisions of municipal courts concerning 'foreign relations law', e.g. the definition of territory, but also decisions concerning the limits of civil jurisdiction (no less than criminal jurisdiction), personal status (no less than nationality), and of recognition of foreign judgments (no less than foreign acts of State). This notion, expressed briefly, may seem too schematic to meet the facts and yet it leads toward a more realistic assessment of what happens. A reservation which does occur concerns his assumption (as it seems) that the two systems correspond neatly to distinct parts of the constitutional structure: in fact both approaches to problems may appear in the deliberations and decisions of the executive, whilst the Courts may defer (*pace Sabbatino*) to an 'executive' approach. In all, this spare book provides ample reading.

IAN BROWNLIE

Grotius and the Law of the Sea. By FRANS DE PAUW. Brussels: *Les Éditions de l'Institut de Sociologie de l'Université Libre de Bruxelles*, 1966. 76 pp. No price stated.

Few of the problems dealt with by Professor de Pauw will be new to students of the history of international law, and he relies mainly on the work of earlier historians of the subject in reaching his conclusions. He has nevertheless produced a useful and stimulating little book on the evolution of Grotius's ideas.

He argues that the *Mare Liberum* was a piece of special pleading in a special situation, though he agrees with Molhuysen in challenging the view that Grotius appeared as advocate for the Dutch East India Company in the Prize Court proceedings. Between those proceedings and 1625, when the *De Jure* appeared in full, his ideas on the law of the sea had undergone important changes. (He himself later in life dismissed the *Mare Liberum* as a young man's book.) By that time, he had had years of exacting experience as a diplomat, as G. N. Clark and W. van Eysinga have shown in their accounts of the Anglo-Dutch colonial conferences.

The major change was that he abandoned his earlier stand for freedom of trade and navigation as an unimpeachable axiom. After the conferences he assumes that it could be modified by contract. Professor de Pauw is severely critical of Grotius's defence of the Dutch monopoly treaties with the Eastern rulers, which he regards as inconsistent with

the *Mare Liberum*. He emphasizes too that Grotius contradicts himself in the *De Jure* over the occupation of enclosed parts of the sea. Later he admitted frankly that the question was no longer *whether* a state could take possession of the sea but *how much* it should take—as Professor de Pauw says, the problem that has characterized the whole theory of territorial waters ever since.

The main value of this little critical study is to emphasize that these inconsistencies and changes of view in Grotius are essentially related to the practical nature of his career, and particularly to the search for solutions to the legal disputes over fisheries and colonial trade which arose between the United Provinces and England. If the treatment pulls him off his pedestal from time to time it has the merit of replacing him in his historical niche more firmly than before. He is after all not the first nor will he be the last great public figure to be charged with opportunism as a result of utterances made under the pressure of events.

CHARLES WILSON

Aspects du droit de l'énergie atomique. Vol. I: *Responsabilité; Assurance; Transport*. Edited by Henry Puget. Paris: *Éditions du Centre National de la Recherche Scientifique*, 1965. xi+348 pp. No price stated.

New law comes either from new things or from new attitudes to old things. The alteration of law to fit changed attitudes is certainly the subtler process, but its creation in response to technical advance can be very dramatic, as this fine collection of lectures on the law of nuclear energy demonstrates.

For centuries lawyers have been making rules to control dangers and to regulate their effects. Why should the manufacture and use of radioactive substances call for special law? Why not apply, by analogy, the law of fire? Is it simply that while fire is familiar and burning perceptible, radiation is strange and its operation on us insidious? We are ignorant about it, certainly—and when we ask our advisers, they go off into Greek letters and powers-of-ten and Röntgen-equivalents-medical. Since *omne ignotum pro magnifico* we are also afraid. Fear makes for odd reactions and strange bedfellows. Is the striking co-operation in the creation of nuclear law simply the solidarity of panic? Have we built, as one of the contributors suggests, a legislative labyrinth round a Minotaur which might be tamed by a bottle of hay?

One must distinguish. The 'maximum credible accident' (the runaway reactor) is, admittedly, pretty big. Its effects would cross national boundaries, last longer than the normal period of prescription, and cost a fortune to repair. The promethean legacy was less calamitous. The normal nuclear accident, however, arising from the very common use of radio-isotopes in industry and laboratories, is rather small; weedkillers and aspirin certainly take a greater toll. The distinction is accepted in international conventions and national legislation—radio-isotopes are 'excepted matter'—but the insurers have not done so well. It was a sensible reaction to the fear of catastrophe for them to pool their resources; but to use the resulting monopoly to exclude small nuclear risks from standard policies was an unjustifiable deference to ignorance. This panic measure is tellingly castigated by M. René Gautron, whose other contributions help to give this volume its cover of both catastrophes and limited accidents.

It is really the limited accident which best tests the lawyer by straining his concepts. For example, a burn is an accident and pneumoconiosis a disease; if we have separate systems for industrial accidents and professional diseases, how do we classify the consequences of radiation? Again, is it 'injury to the person' if a suspected victim of

radiation is put under medical observation for two weeks with negative results? Is it 'damage to property' if goods are contaminated and temporarily withdrawn from use? Is the employee's dosifilm, processed by his employer, evidence in a suit between them? These questions, and many others, are excellently discussed in this book.

Prevention is better than cures, of course. Radioactive substances are made, transported, used and disposed of, and all these processes, of which the second and fourth expose third parties to the greatest risk, call for regulation. There is curiously little about disposal of waste in this collection, but there is a very charming lecture on how to wrap up hot stuff for carriage. The elaboration of these prophylactic rules shows nice co-operation between experts and lawyers—over twenty-eight international organizations and all the United Nations collaborated to produce the transport rules—and the result is a treat for administrative lawyers, at any rate when presented with the clarity of MM. Duvaux and Salleron.

Public international lawyers will no doubt be most interested in the four conventions contained in the appendix and discussed in the body of the work. The Paris Convention of 1962, open to members of O.E.C.D., and the Vienna Convention of 1963, open to all members of the United Nations, deal with liability for nuclear catastrophes. The provisions of the latter are necessarily more modest, but the guide-lines are the same. The aim is to secure compensation for the victims without unduly inhibiting the exploitation of this needed source of energy. This is done by requiring the licensee of a nuclear installation to insure against his liability, which is exclusive, strict and limited. Above the limit, his State steps in. For yet higher amounts, under the Paris Convention, States contribute sums determined by their gross national product and the power of their reactors. Many questions are reserved to the national laws, which diverge in important respects. The Nuclear Installations Act 1965 appears to go beyond our conventional commitments (e.g. by extending the limitation period from ten to thirty years and by eliminating the defence of Act of God); it envisages, but cannot of course guarantee, the provision of forty-three million pounds—a sum rather less than one-quarter of the sums paid out annually under motor policies. Nuclear-powered ships are covered by the Brussels Convention of 1962, which is luminously discussed in the text.

This volume has all the advantages of a collection of lectures on the law relating to an activity. There is something to interest lawyers of all kinds, especially as the contributors are not all lawyers—the freshest contributions come from industrialists, insurance men and engineers. It has the inevitable disadvantage, too, that the lectures sometimes overlap and sometimes leave a gap. Since they were delivered over a period of six years, they are not all perfectly up to date; in this area loose-leaf publications are not just a fashion but a necessity. Nevertheless, the quality of the lectures is so very high that one must be grateful to the Director of the Centre of Studies in Atomic Law of the Institute of Comparative Law of the University of Paris for making them available to a much wider public than the lucky few who heard them, and for equipping the collection with his lucid introduction and an admirable bibliography.

J. A. WEIR

European Institutions: Co-operation; Integration; Unification (2nd ed.).
By A. H. ROBERTSON. London: Stevens & Sons Ltd., 1966. xxi+427 pp.
£3. 15s.

The first edition of this book, published in 1958, rapidly became established as an authoritative concise survey of the principal regional institutions within Europe which

was essential reading both for students of international law and international relations. This much-needed new edition affords the author and his readers an opportunity to consider the great changes that have occurred during the past ten years. The older institutions have developed apace and have been supplemented, sometimes transformed, by the new. The European Economic Community and Euratom have come into existence, E.F.T.A. was created by way of reaction to their economic and political implications, O.E.E.C. has become O.E.C.D., the work of the Council of Europe has burgeoned—both in the field of human rights and in a far-reaching legal programme—and a number of important specialist organizations have been established to regulate such rapidly changing fields of advancement as international telecommunications and space research. There is still much overlapping of activities and fragmentation of effort. If the scene appears new in some respects, many of the old underlying problems remain little nearer a solution. The second British application for membership of the European Economic Community is now under scrutiny; it may be salutary for those lawyers who are critical of the reception of this application in certain quarters abroad to trace the wavering British attitude toward the *relance européenne* that is reflected in Dr. Robertson's narrative in this book.

The whole text of this new edition has been revised, much new material has been added, and events up to the autumn of 1965 are recorded. Wisely, Dr. Robertson does not attempt to draw up a balance sheet of gains and losses. He is content with a scholarly descriptive commentary supplemented by very full footnotes and bibliographical notes, and by appendices (which take up 150 pages of the work) concerning the treaties or other constitutional provisions governing the various institutions and organizations. This is a learned work and one which reflects the wide practical experience of a distinguished international official; it should therefore continue to appeal to a large audience, especially those who require a succinct and realistic account of the processes through which different forms of the 'European idea' have found expression during the past twenty years. Dr. Robertson is remarkably successful in drawing together the diverse threads and in presenting the reader with a clear picture of the principal variants in scope, structure and function. He is careful throughout to distinguish between the movements toward European 'unity', European 'integration' and European 'co-operation' and to stress the great divergence, both of belief and of practice, between those States who favour the 'Community system' and those who still adhere to the established processes of intergovernmental co-operation.

This is a most useful and satisfying work which has the merit of being, for the purposes of very many readers, essentially self-contained. It presents a wide range of materials dispassionately yet conveys very definitely the impression of an underlying reasoned belief in the eventual reconciliation of the differing loyalties which are obstacles in the path of further progress toward the transformation of Europe.

K. R. SIMMONDS

Diplomatic Asylum: Legal Norms and Political Reality in Latin American Relations. By C. NEALE RONNING. The Hague: Martinus Nijhoff, 1965. v+242 pp. Fl. 27.

The idea of regional international law, in the sense of a body of customary law evolving and operating autonomously alongside universal international law, has been accorded relatively little attention by writers outside Hispanic America. Although scant attention is devoted to the subject in most general treatises published in Europe and

North America, the passing references to it are invariably accompanied by brief allusions to some of the more exotic State practices of the Latin American republics. This study, by a political scientist at Tulane University in New Orleans, examines the character and historical development of one of the more interesting of these practices. In so doing it sheds a good deal of light on the nature of so-called 'American international law'.

The point of departure for Dr. Ronning's study is the decision of the International Court of Justice in the *Asylum* case of 1950, in which it was held that Colombia had failed to discharge its burden of proving that 'American international law in general' conferred upon the State granting diplomatic asylum the competence to make a unilateral qualification of an offence as 'political'. The Court, while taking due notice of the scores of cases cited by Colombia in which a refugee had been given a safe conduct from the territorial State, found no evidence to support the proposition that legal obligation, rather than political expediency and local usage, constituted the basis for the acquiescence of the territorial State. Dr. Ronning's extensive examination of the treaties and the State practice of the republics of Hispanic America confirms the accuracy of the Court's decision with respect to the burden of proof placed upon the State asserting 'American international law'. What is more important is Dr. Ronning's conclusion that evidence is simply not available 'that there is a customary rule of law in Latin America sanctioning the unilateral qualification of the offense by the State granting asylum' (p. 213). Despite an apparent inclination to accept the claims of some Hispanic American publicists concerning a putative customary law of regional application, he concludes that the Latin American republics 'have not consistently recognized the existence of a *legal* obligation to respect such a practice or a *legal* right to engage in it' (p. 215, italics supplied). While in no sense under-estimating the very real importance of the institution of diplomatic asylum in introducing a measure of humanitarianism and predictability in the unstable environment of Latin American politics, Dr. Ronning recognizes that the relevant claims have not been tolerated in sufficiently uniform or constant patterns to enable one plausibly to adduce a general practice accepted as law. It is interesting to note, moreover, that the much-vaunted regional doctrine of non-intervention—the very keystone of 'American international law'—seems to have been one of the major obstacles to the development of the institution of diplomatic asylum on a firm juridical basis. It would certainly appear to be true, as the author suggests in his final chapter, that the United States' final renunciation of the practice, even in those Latin American States which tolerated it, accompanied the emergence of the North American policy of non-intervention in the late 1920s and the 1930s.

The institution of diplomatic asylum has often been the object, particularly in Latin America, of much uncritical juridical speculation and many exaggerated claims. Dr. Ronning has produced a penetrating and well-documented politico-juridical study that should do much to bring the subject out of the shadows. Although not without its serious faults—including several loosely organized chapters and a wholly inadequate index—this book is a welcome and commendable contribution to the literature of the law of Latin American relations.

J. A. CABRANES

A Diplomat's Handbook of International Law and Practice. By B. SEN. Foreword by Sir Gerald Fitzmaurice. The Hague: Martinus Nijhoff, 1965. xxxiii+522 pp.+Table of Cases, Bibliography and Index. Fl. 58.50.

'Mr. Sen has done something which I have long felt needed to be done', says Judge Sir Gerald Fitzmaurice in his Foreword to this excellent book, and he recalls the difficulties he encountered in his earlier days when assembling from treatises, monographs and files of the Foreign Office scattered information on rules of international law which a legal adviser ought to consider in order to 'give his Chiefs definite advice, or to solve a concrete problem, not as an academic exercise, but in relation to the facts of a particular case' (p. viii). To this day such difficulties subsist for want of a handy legal manual—at least in English. They exist not only for a legal adviser but for any diplomat or international civil servant who, in his work, must so often take legal considerations into account. A legal companion volume to Satow's *Guide to Diplomatic Practice* is therefore most welcome.

It is doubly welcome coming from so distinguished and experienced an author. Having acted as Legal Adviser to the Indian Ministry of External Affairs for years, Mr. Sen practises now as a Senior Advocate before the Supreme Court of his country. He is also Secretary to the Asian-African Legal Consultative Committee, and indeed his book throws valuable light on the views and practice of governments in those two continents with which many readers will not be familiar. They will be reassured to find that divergencies from European or North American notions are not very frequent and not often very substantial (for instances, see pp. 30, 37, 39, 96-7, 312, 392, 397 and 403).

The book falls into three parts: the first deals with the establishment and conduct of diplomatic relations, the functions of diplomatic agents and their privileges (some 180 pages); the second, with consular functions and privileges (about 100 pages); and the third (another 200 pages) with some selected topics of international law of special importance to foreign service officers. The Vienna Conventions on Diplomatic Relations (1961) and on Consular Relations (1963) are reproduced—regrettably, in extracts only—in the Appendices.

No important question remains undiscussed in the chapter concerned with diplomatic relations. Mr. Sen's account of the mechanics of opening relations between States, of the significance of diplomatic ranks, of the *agrément* procedure, of considerations determining the size and location of a mission, etc., is written not only with inside knowledge of every detail, but with historical perception and a keen sense of the needs, and possibilities, of the new States. Thus he analyses carefully the circumstances in which the same person can be concurrently accredited as envoy to different States. On the other hand, he is sceptical about the possibility of the same person's representing several States (see pp. 22-3; cf. Articles 5 and 6 of the Vienna Convention of 1961).

The functions of a diplomatic agent are, for the most part, enumerated in Article 3 of the Vienna Convention of 1961. Unfortunately, there is no agreement on the ways in which his basic functions may be exercised without running the risk of being charged with interference in the affairs of the host State. To what extent can he openly criticize its policies? May he maintain relations with persons opposing them? What 'lawful means' may he employ to ascertain conditions and developments in the receiving State for the purpose of reporting home? May a mission, as part of its information activities, disseminate comment critical of the policies of that State, which has been published at home? In answering these questions in the light of present-day stresses and strains,

Mr. Sen supports by sound legal argument a view that preserves for the diplomat a vital personal part in the development of relations between the host State and his country. Not for him the notion of a diplomat with functions stripped to attendance at formal occasions, the mute transmission of governmental communications, the reporting of paraphrased official handouts to one's capital, and assiduous crystal-gazing behind the shutters of the embassy (no doubt, carefully 'bugged')! The diplomatic agent must, he thinks, take an interest in the internal affairs of the receiving State and may remonstrate and argue against its policies. He should 'avoid being too intimately connected with the affairs of the minorities', but—and here the experience of an ex-member of the Indian service is telling—'he need not keep quiet if there is a persistent and systematic violation' of their rights (p. 72). However, he must exercise great care in influencing opinion in favour of his own State. It would 'not only lead to chaos but would also strike at the very root of diplomatic relations' if he were to render *active aid* to opposition parties (p. 76). Where a diplomatic mission issues a news bulletin, it would be improper—according to Mr. Sen—for the receiving State to stop its publication as long as it does not encroach upon the internal affairs of that State or refer to matters on which the two States are in conflict. This view, it is submitted, is too narrow. As the publication of a news bulletin is agreed, the issuing mission must, as a minimum, be accorded the right to publish, at its own discretion, *any* public statement of a member of its own government. Without such a right, fully exercised by totalitarian States in democratic countries in the recent past, political information activities are a sham.

No problem which arises in modern diplomatic or consular practice is omitted from the author's methodical and analytical survey of exemptions, immunities and privileges—whether it be questions of status of trade representatives engaged in commercial transactions; the treatment of claims against the insurance company of a diplomatic agent; the application of social security legislation to diplomatic, consular or other mission staff; or the treatment of diplomatic bags entrusted to captains of commercial aircraft.

In his account of the law relating to diplomatic agents, and that of consular law which follows, Mr. Sen reviews the differing national laws and judicial decisions, discusses the recommendations of the International Law Commission and analyses the Vienna Conventions. He does not hold out much hope that their provisions will bring about uniformity where national practice varies at present (see, for instance, pp. 87 and 206).

The topics selected for the last part of his book range from Diplomatic Protection of Citizens Abroad and Commercial Activities of States to Recognition and Treaty Making.

What the author says on nationalization under the first of these headings is of great practical interest. First, he summarizes the four 'possible' views on the subject—the 'traditional' view requiring 'prompt' and 'just' compensation for the alien; the view according to which he should be treated like a national; Professor de Visscher's opinion that nationalization of major resources only is lawful; and the view held by Asian and African countries (though not by Japan). The latter, he says, permits discrimination against the alien owner and, though it concedes the need for *some* compensation, is largely influenced by the conviction that if *full* compensation or the market value had to be paid, 'it would be practically impossible to carry out the schemes of nationalization' (p. 313).

Mr. Sen finds it difficult to decide which is the correct view of the law today. He himself opts for a *via media*: in taking up the case of his co-national whose property has

been taken, the diplomatic agent should ask for 'adequate' compensation. This 'need not be the full value for the property'; yet it 'would not certainly be a nominal sum' nor fixed by the seizing government 'in its discretion' (p. 314). The questions who, and on the basis of what criterion, should determine 'adequate' compensation and whether payment should be 'prompt' and 'effective' remain unexplored by the author.

After surveying the attitude of various States to the question of trading by governmental agencies, the author comes to the conclusion that in the interest both of the States and of the individuals trading with them international regulation of the problem is urgently called for. Incidentally, the Asian-African Legal Consultative Committee has, in the meantime, recommended that the principle of State immunity should not extend to such activities.

Another topic that merits attention in a world of emerging nations and constitutional change is recognition—a subject of diplomacy in which law and politics are particularly closely entwined. Here Mr. Sen is perhaps less clear than usual when, after affirming that recognition is a 'matter of absolute discretion' for each State, he opines that, once the normal conditions for recognition are satisfied, 'the new State ought to be recognized without recourse to other considerations' (pp. 414–15). His discussion of the subject is largely based on the late Sir Hersch Lauterpacht's study, though, in the light of subsequent events, he does not fully accept its conclusions. He does not agree that, as distinct from the test of general 'acquiescence', the nineteenth-century British criterion of 'popular consent' should apply again to the recognition of governments.¹ If it were, 'a number of governments', as he tersely remarks, 'would go unrecognized' (p. 426). On the other hand, unlike Sir Hersch, he thinks that, to be recognized, a new government must be willing to honour its international obligations. This, he says, will not only show its true character but help to reassure the recognizing States that their interests will not be jeopardized (p. 424). His attitude to such problems is inspired, not by an esoteric idealism or ideological dogmatism, but by realism and moderation which, as a foundation of peace, value before all business-like relations between States. In this connection it is regrettable that, apart from giving a set of examples (pp. 193–4), he is so tight-lipped on the question of rupture of diplomatic relations.

Nobody will quarrel with the choice of subjects discussed in this part of his book. There are, however, two important omissions: First, few foreign service officers will avoid being deeply involved at various stages of their career at home and abroad in what Philippe Cahier calls *la diplomatie à travers les organisations internationales*. Understandably, they will turn to Mr. Sen's *Handbook* for guidance on the basic legal notions in accordance with which such organizations operate. Second, what is *very* badly needed, especially by younger diplomats, is advice on the *drafting* of legal instruments other than treaties which, of course, are prepared by the Legal Advisers. Supported by a few specimens of resolutions, minutes, protocols, etc., such advice would be a fitting sequel to the author's chapter on treaty-making which in itself is a model of clarity and brevity.

The reviewer does not fear—as did Mr. Sen when he wrote the book (p. xv)—that such additions would make its second edition (bound to be required fairly soon) too long: he would welcome it! Nor is the argument that international organizations are a 'specialized' subject an excuse for a writer with Mr. Sen's gift of clear exposition. The

¹ On the morrow of the Second World War, Sir Hersch thought that there was no compelling reason to assume that the abandonment of the test of 'popular consent' after the First World War was 'more than a temporary adaptation to a transient period of political retrogression': see (Sir) H. Lauterpacht, *Recognition in International Law* (1947), p. 139.

reviewer hopes also that by more careful checking and proof-reading the inordinate number of minor inaccuracies, mis-spellings and misprints could be eliminated (Mr. Hoare (sic!) Belisha was never British Ambassador in Paris—p. 24; it is not true to say without any qualification, that ministers of government have precedence over ambassadors or that the most senior ambassador is invariably the doyen—p. 43; the Second Secretary of the Turkish Embassy in Washington could hardly, in 1928, have 'collided with another automobile'—p. 110; no references are given for quotations from Mr. Lansing on p. 47 or from Sir William Hayter and Sir Harold Nicolson on p. 69; the names of Bismarck on p. 7, of Keiley on p. 26, of Tchitchérine on pp. 116 and 117 are mis-spelt, etc., etc.).

All in all, however, this most useful work has the qualities required from a handbook: well arranged, clear and concise, it is reliable in its exposition of the general outline of existing law. On questions which leave room for doubt the author brings to bear the mature judgment of an experienced practitioner, and the views and advice he has to offer—whether one agrees with him or not—always show his good sense and his knowledge of the real needs of good diplomacy.

ALEXANDER ELKIN

The Power of the International Court to Determine its Own Jurisdiction. By IBRAHIM F. I. SHIHATA. The Hague: Martinus Nijhoff, 1965. xxii + 400 pp. + Index. £5. 8s.

The present work is timely and interesting; interesting especially in view of the recent *South-West Africa (Second Phase)* case¹ which of course was decided just after Mr. Shihata's study was published, and which would seem to raise some doubt about Mr. Shihata's somewhat tentative conclusion that 'the Court has already made a law of jurisdiction rich enough to allow a rather accurate prediction of its stand in future cases'² (p. 304).

In 1966 the Court reached a decision on a preliminary issue which was, on the face of it, difficult to reconcile with that which it had reached in 1962.² Was the Court justified in so acting? In the *Corfu Channel (Assessment)* case³ the Court declared that 'its jurisdiction was established by its Judgement of 9 April 1949; that, in accordance with the Statute (Article 60) which, for the settlement of the present dispute, is binding upon the Albanian Government, that Judgement is final and without appeal, and that therefore the matter is *res judicata*'. Yet, in the *Haya de la Torre*,⁴ *Nottebohm*⁵ and *Interhandel*⁶ cases, the Court permitted at the second stage the consideration of issues which, in many respects, had already been pronounced upon by the Court at the first stage. Mr. Shihata distinguishes preclusion of the parties from preclusion of the Court, and states that, as regards the parties, after a decision on jurisdiction is rendered, the same objection generally may not be invoked by a party on the same arguments or without further argument (*Corfu Channel* case); but that, where a party reserves the right from the beginning to raise further objections, a decision affirming jurisdiction might not be a barrier against raising new objections to the admissibility of the claim or the standing of the parties (*Nottebohm* case) (at p. 78).

¹ *I.C.J. Reports*, 1966, p. 6.

² *South-West Africa (First Phase)* case, *I.C.J. Reports*, 1962, p. 319.

³ *Ibid.*, 1949, p. 244 at p. 248.

⁵ *Ibid.*, 1955, p. 4.

⁴ *Ibid.*, 1951, p. 71.

⁶ *Ibid.*, 1959, p. 6.

As regards preclusion of the Court itself, it is necessary first to consider whether the Court may *proprio motu* raise an issue of jurisdiction which has not been raised by the parties. Under the Statute, where one of the parties does not appear before the Court, or fails to defend its case, the Court is required to satisfy itself that it has jurisdiction (Article 52 (2)), and again, under Article 32 (2) of the Rules, when a case is brought before the Court by means of an application, this application must, *inter alia*, 'as far as possible specify the provision on which the applicant founds the jurisdiction of the Court'. Mr. Shihata agrees that in the particular instances envisaged by these rules the Court must of its own accord consider its jurisdiction but denies that these Articles give the Court a general power to challenge its jurisdiction *proprio motu*. Indeed Article 36 (6) of the Statute expressly makes the Court's power to determine its own jurisdiction conditional on the qualifying words, 'in the event of the dispute'; and in the *Norwegian Loans* case the Court refused to discuss the highly important question of the validity of the 'self-judging reservation' in the French declaration on the grounds that the parties recognized the reservation as 'constituting an expression of their common will relating to the competence of the Court'.¹ Consequently, from an examination of the practice of the Permanent and International Courts, Mr. Shihata concludes (at p. 66) that it is not possible to reach any unqualified conclusion like that of Fitzmaurice when he wrote: '... the tribunal may raise any question of jurisdiction *proprio motu*, irrespective of whether the parties do so, and even if neither party disputes the jurisdiction'.² It seems, however, that this dogmatic attitude has now prevailed with the Court. Certainly the Court has now affirmed 'the recognized right of the Court, implicit in paragraph 2 of Article 53 of its Statute, to select *proprio motu* the basis of its decision'.³

Though he may have predicted wrongly on this point, Mr. Shihata was right on the *res judicata* point. As he suggests, the Court generally rephrases the issue so as to defeat any claim that a previous preliminary objection is identical in substance to a claim under later consideration on grounds of admissibility or standing of the parties. Thus the Court in the *South-West Africa (Second Phase)* case nicely asserted: 'To hold that the parties in any given case belong to the category of States specified in the (jurisdictional) clause,—that the dispute has the specified character,—and that the forum is the one specified,—is not the same thing as finding the existence of a legal right or interest relative to the merits of the claim'.⁴ Mr. Shihata predicts that if the Court is squarely confronted with a plea of *res judicata*, it will not qualify a preliminary finding as a 'decision' for purposes of Article 59 or as 'final' within the meaning of Article 60 of the Statute. No Court can be expected to confirm its jurisdiction if in the same case it should later prove that such jurisdiction is unfounded. To do so would be an *abus de pouvoir*; only a decision based on valid jurisdiction can acquire the status of *res judicata*.⁵ Whilst not fully endorsing these arguments, the International Court in its latest decision was emphatic that 'a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits'; the latter might constitute a part of the motivation of the decision on the preliminary objection but never be the object of that decision.⁶

On these matters Mr. Shihata has, therefore, provided a useful handbook to the Court's practice; but when one tries to understand another part of the Court's decision

¹ *I.C.J. Reports*, 1957, p. 9 at p. 27.

² *This Year Book*, 34 (1958), p. 28.

³ *South-West Africa (Second Phase)* case, *I.C.J. Reports*, 1966, p. 6 at p. 19.

⁴ *Ibid.*, p. 37.

⁵ In support, Mr. Shihata cites on p. 78 the *Von Tiedmann* case (1926), 6 *Rec. T.A.M.* 997, 1003, before the Polish-German Mixed Arbitral Tribunal.

⁶ *I.C.J. Reports*, 1966, p. 6 at p. 37.

he is less helpful. The Court found that the applicants, Ethiopia and Liberia, had not established their legal right or interest regarding the subject-matter of their claim. Applying the municipal rule *pas d'intérêt, pas d'action*, it declared: 'It is a universal and necessary, but yet almost elementary principle of procedural law that a distinction has to be made between, on the one hand, the right to activate the court [*le droit de saisir un tribunal*] and the right of the Court to examine the merits of the claim [*de connaître du fond de la demande*] and, on the other hand, the plaintiff party's legal right in respect of the subject-matter of that which it claims, which would have to be established to the satisfaction of the Court [*le droit au regard de l'objet de la demande*].'¹ Elsewhere the Court stated that humanitarian considerations are not sufficient in themselves to generate legal rights and obligations. The International Court is 'a Court of law, and can take account of moral principles only in so far as they are given a sufficient expression in legal form'² and dryly observed 'the underlying proposition that by conferring competence on the Court a jurisdictional clause can thereby and of itself confer a substantive right is one which the Court must decline to entertain'.³

It is the Court's reliance on this independent concept of 'legal interest' or 'legal basis' to dismiss the application that raises a highly controversial issue, and here, when one turns to Mr. Shihata's book for some analysis of the concept, one is a little disappointed; though it would be unfair to expect Mr. Shihata to have anticipated a decision which surprised not a few. He marshals the relevant passages from the judgment and dissenting opinions of the Court's 1962 decision, refers briefly to the *Wimbledon* case and concludes that there exists a requirement that the dispute should relate to the legal interests of the applicant, 'at least in the sense that the latter should expect some benefit, protected by law, from a favourable decision on the merits' (p. 214). But have these terms 'benefit', 'interest' and 'protected by law' independent meaning or are they nothing but tautologies, of particular use to courts where legal remedies are being extended but judicial caution is necessary? Certainly this seems to be the position in English municipal law where actions for a declaration or an injunction have recently received considerable development as remedies for challenging acts of administrative and industrial bodies; deference is paid to the notion that the applicant must have a 'sufficient legal interest' but its content is being constantly expanded (*Abbott v. Sullivan*,⁴ *Barnard v. National Dock Labour Board*,⁵ *Pyx Granite Co. v. Ministry of Health*);⁶ similar developments are to be observed in the United States law relating to standing.⁷ Nor are international courts unfamiliar with the problem; the Permanent Court considered the applicant's interest when interpreting the *Peace Treaties*,⁸ *Mavrommatis Palestine Concession*,⁹ *Interpretation of the Statute of Memel Territory*,¹⁰ and the *Minority Treaties (Minority Schools in Upper Silesia)*¹¹ cases, and held Great Britain, France, Italy and Japan to have a clear interest in the *Wimbledon* case, 'since they all possess fleets and merchant vessels . . . even though they may be unable to adduce a prejudice to any pecuniary interest'.¹² An applicant's interest has also been considered in cases arising under the constitution of the International Labour Office.¹³

¹ Ibid., p. 39.² Ibid., p. 34.³ Ibid., p. 42.⁴ (1952), 1 K.B. 189 at 217.⁵ (1953), 2 Q.B. 18.⁶ (1960), A.C. 260.⁷ Louis L. Jaffé, 'Standing to Secure Judicial Review: Public Actions, Private Actions', *Harvard Law Review*, 74 (1961), p. 1265; *ibid.* 75 (1962), p. 255, cited by Judge Jessup in his dissenting opinion, *I.C.J. Reports*, 1966, p. 6 at p. 386.⁸ Ibid. (1960), p. 65.⁹ *P.C.I.J.*, Ser. A, No. 2, p. 26.¹⁰ Ibid., Ser. A/B, No. 47, p. 243.¹¹ Ibid., Ser. A, No. 12, p. 50. The International Court in its 1966 judgment expressly distinguished the minority treaty cases.¹² Ibid., Ser. A, No. 1, pp. 20 and 33.¹³ *Ghana v. Portugal*; *Portugal v. Liberia*; *I.L.O. Official Bulletin*, 46 (1963), No. 2. Judge

The International Court's rejection of the application by Ethiopia and Liberia is, therefore, disappointing for those who would wish to see the area of legal control in international relations extended. Employing their, in the opinion of the reviewer somewhat doubtful, notion of legal interest,¹ the Court has refused to accept that a general obligation to a community may be enforced at the suit of a member of that community who has a particular and close link with the political origins of the legal obligation.

The above discussion has covered only a few passages in Mr. Shihata's book but it is hoped that this detailed examination has served to demonstrate his method. More and more judgments of the International Court represent a compromise of many individual views, condensed in style, and consequently, without a commentary or careful reading of the separate or dissenting opinions, incapable of being fully understood when read on their own. Mr. Shihata's book is invaluable for collecting and summarizing everything relevant said by the Permanent and International Courts on jurisdictional issues, and, in particular, on the nature of seisin of the Court, the jurisdictional titles on which a case may be brought before the Court, and the techniques which the Court will adopt especially in disposing of 'self-judging' reservations to States' acceptances of jurisdiction—techniques which are shown to be derived both from the parties' intentions and from the inherent qualities of the Court as a court of international law and justice and a principal judicial organ of the United Nations.

In the Appendix of eighty pages Mr. Shihata includes useful tables of the cases on which preliminary objections were raised and of the jurisdictional titles under which they were brought before the Court. Throughout, the work is written in a lucid, pleasant style.

HAZEL FOX

Studies in International Law. By J. G. STARKE Q.C. London: Butterworth & Co. Ltd., 1965. ix+174 pp. £1. 17s. 6d.

The eleven essays in this volume were written over a span of thirty years and cover a wide range of subjects of legal theory, the law of peace and international organizations. All except one, 'The Protocol in League of Nations Practice', have previously been published in various journals, but, with the exception of the two most recently published, they are brought up to date by supplementary notes. These are not merely additional bibliographies: thus 'The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs' (first published in 1937) is augmented by a comparison with the Narcotic Drugs Convention of 1961, and the notes to 'Recognition at International Law' (first published in 1950) deal with recognition in the practice of States since 1950.

Some of these essays are old friends, especially to readers of the *British Year Book of International Law*, who will need no introduction to 'Imputability in International

Jessup in his dissenting opinion, referred to above, relied on these cases and also the *Reservations to the Genocide Convention*, *I.C.J. Reports*, 1951, p. 15, and practice relating to the enforcement of the régime of international waterways.

¹ Confronted with the authorities from the international tribunals cited above, the Court temporarily shifted its ground declaring itself hesitant to dismiss the applicants on the ground that their right or interest would not have a material or tangible object. 'The Court simply holds that such rights or interests in order to exist must be clearly vested in those who claim them' (*I.C.J. Reports*, 1966, p. 6 at p. 46). Article 7 of the Mandate, however, clearly disposes of the vesting point and the Court elsewhere in its judgment repeatedly stressed the absence of a legal interest on the part of the applicants.

Delinquencies', with its lucid analysis of the *Finnish Ships* case, or 'Treaties as a "Source" of International Law'. In the latter, the division into law-making treaties and treaty-contracts is somewhat unconvincing, and one could wish for more emphasis on the importance of the treaty-making procedure as a source of law and less attention to the contents of treaties. Less well known, perhaps, are 'The ANZUS Security Treaty of 1 September 1951' and the essay with which it is closely allied, 'Regionalism as a Problem of International Law'. These are particularly valuable for the student of international organizations, as is also the longest and penultimate essay in the volume, 'The Contribution of the League of Nations to the Evolution of International Law', in which Mr. Starke looks back at the League and estimates its role in international society and the value of its work. The earliest and the most recent essays deal with related topics, 'Monism and Dualism in the Theory of International Law' and 'The Primacy of International Law' respectively, and in both of them the views of Kelsen, in particular, are discussed; the latter essay ends with a handsome tribute to him as the 'complete master of the theoretical analysis of international law'.

One cannot fail to be impressed by the diversity of Mr. Starke's interests. Equally impressive are his methodical approach, his economy of expression and his lucid style. This is a most readable and useful collection of essays, and is one which any international lawyer will be glad to have on his bookshelves.

C. A. HOPKINS

The ANZUS Treaty Alliance. By J. G. STARKE Q.C. Melbourne University Press; London and New York: Cambridge University Press, 1965. xiv+315 pp.+Bibliography and Index. \$8.50 (Australia: 85s.).

On 1 September 1951 Australia, New Zealand and the United States signed the security treaty known as the A.N.Z.U.S. Alliance. For Australia it was the fulfilment of an aspiration cherished since 1937, when Prime Minister Joseph Lyons appealed at the Imperial Conference for a Pacific security system. The Second World War established the indispensability of American strength to any such system. The United States itself, after much hesitation came (after the outbreak of the Korean War) to regard A.N.Z.U.S. as an interlocking complement to the other security treaties which it began to construct in the Pacific, the agreements with Japan, the Philippines, South Korea, Nationalist China, and later, in 1954, with its partners in S.E.A.T.O. With the advent of the nuclear balance A.N.Z.U.S. fell into place as part of America's global strategy.

The A.N.Z.U.S. Alliance, the subject of Mr. Starke's clear and informative study, is, like N.A.T.O., a regional collective defence arrangement authorized by Article 51 of the United Nations Charter. It contains, however, no parallel to the provision for economic co-operation embodied in Article 2 of the North Atlantic Treaty, and its Article 4, which lays down the *casus foederis*, is more reminiscent of the Monroe Doctrine than of the Atlantic Treaty's corresponding Article 5; it states that each signatory *recognizes* 'that an armed attack in the Pacific area on any of the Parties would be dangerous to its peace and safety', and *declares* that it would 'act to meet the common danger in accordance with its constitutional processes'. Moreover, in contrast to that of N.A.T.O., the organizational side of A.N.Z.U.S. is as simple as could be; it consists merely of a Council of Foreign Ministers or their deputies, which usually meets for not more than one or two days once a year. There is no secretariat or joint command structure, though military representatives of the three signatories meet from time to time, and no infra-structure such as common military bases, airfields, supply lines or

training facilities, though in 1961 a United States–Australian agreement was signed to establish a station in Australia to track artificial satellites.

Mr. Starke—he is a member of the Institute of Advanced Legal Studies of the Australian National University—divides his account into four sections: the purpose and historical background of A.N.Z.U.S.; analysis and interpretation of the treaty; the evolution and consolidation of the alliance, including the major developments in it since 1952; and some special problems and issues, notably the proposals made from time to time for admitting new members, the relations of A.N.Z.U.S. with other security systems such as N.A.T.O. and S.E.A.T.O., and the desirability (or rather, as Mr. Starke sees it, the undesirability) of a general Pacific security system in which A.N.Z.U.S. might be merged. Mr. Starke is especially effective in qualifying two widely held impressions about the alliance, one that Britain was brusquely excluded and the other that A.N.Z.U.S. was a sop to Australia and New Zealand to secure their acceptance of the rearmament of Japan. As to the former, Mr. Starke shows that the British Labour Government was lukewarm about a Pacific security system in the early post-war years; only in 1952 did Britain apply for admission to A.N.Z.U.S. Council meetings, when it encountered an American veto. As for A.N.Z.U.S. being a sop to Australia and New Zealand, Mr. Starke makes clear that, while this might have been true for their public opinion, their governments were far too committed to the idea of an American-backed security system in the Pacific to regard it as a *quid pro quo* for something else. On this and many other aspects of this less well-known subject, Mr. Starke has done some very useful research.

F. S. NORTHEGE

The Jurisprudence of the World Court: Volume 1, The Permanent Court of International Justice (1922–1940). By J. H. W. VERZIJL. Leyden: A. W. Sijthoff, 1965. xiv+600 pp. £6. 10s.

Few living writers on international law have greater authority and experience than Professor Verzijl, and these penetrating reflections on the work of the Permanent Court deserve much study. Essentially the work is an assemblage of earlier papers, written and published for the most part in the decade before the Second World War. They are arranged in the chronological order of cases handled by the Court, each case receiving separate study. Cases dealt with between 1922 and 1926 have rather shorter treatment in a single article published in 1926. In the remainder there is either a detailed analysis of the entire case or a study of a central topic: for example, administration of justice on appeal (*Peter Pazmany University* case), national criminal law and national constitutional law before an international forum (*Lotus* case and *Danzig Legislative Decrees*, and the 'Ihlen Declaration'). If there are perhaps too many over-long sentences, the style is lively and often sharp; Lord Finlay is taken to task for taking his stand on Oppenheim as showing what international law is, not what it ought to be, and saying that that demonstration is not refuted by the fact that continental publicists take a different view—'as if English authors alone were able to distinguish the law that is from that which ought to be' (p. 95).

There are musical metaphors too: there is 'the peaceful finale . . . of the passionate movements of the Chorzów Sonata', and there is a witty analysis of the argumentation of the Court in the *Austro-German Customs Union* case, composed of tutti by the Court, with discords afar by minorities, solos by different minorities with discords from others and a concluding aria in the Italian manner (Anzilotti) with its own melody (p. 259).

The method of analysis is forensic. There is logical and crystalline exposition of the arguments of the parties and of the issues before the Court; an outstanding example is in the advisory opinion on *Danzig and the I.L.O.*, where five main issues are delineated with twelve subordinate issues (pp. 206-7). The effect of each study is then of a kind of re-creation of the debates, in which the judges might have engaged in their retiring room. Further, there is the faint implication that the Court should in rendering judgment or opinion stay within the framework of the forensic argument; so in the *Status of Eastern Greenland* case Dr. Verzijl says that, in his view, 'the Danish arguments have continually been overvalued and the Norwegian arguments underrated, and a division of votes more favourable to Norway would in my opinion have more fairly represented the weight of the arguments advanced by the two parties' (p. 337).

This approach finds its parallel in a most interesting discussion of the issue of publicity for separate or dissenting opinions (pp. 411-17). Maintaining that experience up to 1935 at least did not show that the observance of either judgments or opinions of the Court was impaired by the revelation of even large minorities in the Court, Dr. Verzijl says that 'it is not the division of votes, but the force of the arguments of majority and minority which determines the moral authority of the decision' (p. 416). But can divisions in the judgments or opinions of the Court be so easily separated from its moral authority; and if moral authority is to be determined by the logic and elegance of argument, will not the separate or dissenting opinion always have the advantage over the majority opinion, which must always be a difficult reconciliation of eight or more views, often diverging? It would be interesting to see how Dr. Verzijl approaches in his second volume the *Anglo-Norwegian Fisheries* case and the *Reparation for Injuries* case, which may be perhaps fairly put forward among the most influential judgments and opinions of the Hague Court. In both there were substantial minorities, with much force of legal arguments behind them, but would international law be now better off if they had prevailed?

J. E. S. FAWCETT

The Ad Hoc Diplomat: A Study in Municipal and International Law. By MAURICE WATERS. The Hague: Martinus Nijhoff, 1963. xii+233 pp. Fl. 20.

The use of special agents in the conduct of foreign affairs is a form of diplomacy which is essentially American (although not exclusively so: *vide* the mission of Mr. Harold Davies, M.P., to North Vietnam in July 1965), while Mr. Waters points out that 'the use of such agents in the United States has numbered in the thousands'. The representative list in Appendix A bears witness to the variety of rank and function of agents appointed by Presidents of the United States. Thus in 1798 John Quincy Adams was sent with rank of Commissioner to conclude a treaty of amity and commerce with Sweden, and in 1907 Horace Porter attended the Second Hague Conference with rank of Ambassador, whereas between 1941 and 1945 Harry L. Hopkins was sent on six missions to discuss problems of the war with Churchill and Stalin with no diplomatic rank or title.

The first part of this book is devoted to a study of the place of the special agent in American municipal law, and presents the constitutional and political arguments raised for and against the use of such agents both within Congress and by writers. As regards the objection that by Article II, Section 2, of the Constitution the President's power to 'appoint ambassadors, other public ministers . . . and all other officers of the

United States whose appointments are not herein otherwise provided for' may only be exercised 'by and with the advice and consent of the Senate', Mr. Waters takes the view that 'such agents' appointments are not to office because they are temporary, their performance transient and their duties limited' (p. 160). The use of such agents is, he maintains, an exercise of the inherent right of the Executive 'to create agencies which it believes are necessary to carry out its authorized powers'. While recognizing that the use of special agents may create problems, notably the risk of strained relations between the President and the State Department, the author concludes that the advantages to be gained, especially through speed, secrecy and mutual confidence between the President and his agent, outweigh the disadvantages.

In the second part of the book the author discusses the status of special agents in international law. He devotes forty pages to a study of the appointment, functions and immunities of the regular diplomatic agent, with especial reference to the Vienna Convention on Diplomatic Relations, 1961 (which is reproduced in Appendix C). In comparison with this well-regulated individual, the special agent is indeed a chameleon. He may or may not carry letters of introduction; his functions depend entirely upon the terms of his appointment; and the extent of his immunities and of the responsibility of the receiving State for his protection are matters not covered by authority. Mr. Waters has consulted many Foreign Offices, and concludes on the basis of their replies that the special agent 'is not by right entitled to any privileges or immunities', but that he may be accorded certain immunities on the basis of courtesy or perhaps reciprocity (p. 154). He also argues that the special agent is entitled to a greater degree of protection from the receiving State than the average alien, and finds support for this proposition in the report of the Council of the League of Nations on the Corfu Incident, arising out of the assassination of General Tellini in 1923: 'The recognized public character of the foreigner and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf'. So speculative, inevitably, are the author's conclusions upon the topic that one doubts the value of comparison with the regular diplomatic agent. It may be observed, on a point of style, that the work is somewhat repetitive, since each chapter is followed by a summary, and the whole work is summarized in a chapter of conclusions.

In Appendix D, Mr. Waters describes in some detail the agencies of Colonel House and Harry Hopkins. This makes interesting reading, and leads one to wonder whether the political consequences of the employment of special agents would not be a more rewarding study than its legal aspects. But Mr. Waters's monograph is an instructive complement to the report on *ad hoc* diplomacy prepared for the International Law Commission by Professor Sandström, and his findings constitute a welcome addition to the literature of international law and diplomacy.

C. A. HOPKINS

The Use of Experts by International Tribunals. By GILLIAN M. WHITE. Syracuse, N.Y.: Syracuse University Press, 1965. xv+259 pp. \$8.95.

This volume appears in the series edited by Professor Lillich on the procedural aspects of international law. Its object is to survey the practice of as many international tribunals in as many decisions relating to the use of experts as were recorded in generally available reports. The use of experts was found to be more frequent in four types of case: boundary cases, the determination of facts material to issues of international responsibility, questions of valuation and damages and problems of settling a régime

for the future. Examples of these categories are examined in separate chapters. Overall the author has not attempted a comprehensive collection of cases involving use of experts and her treatment is devoted to extracting general principles from the existing practice. In the light of this the more significant chapters are those dealing with the competence of international tribunals to call upon experts and with the role of experts. The work is completed by chapters on the privileges and immunities of experts and the question of fees and expenses, and by appendices containing brief studies of some pertinent aspects of the Court of Justice of the European Communities, the work of Foreign Compensation Commission of the United Kingdom and the Foreign Claims Settlement Commission of the United States, and draft model clauses on experts.

The treatment is substantial and yet there is a nice sense of proportion which prevents the material from hindering the exposition, which is sober and clear. As a study it is definitive in scope and should be of considerable value to practising lawyers, including those responsible for drafting *compromis*. However, the material deployed also provides valuable evidence for the study of the nature of international jurisdiction and the limits of adversary procedure both in international relations and elsewhere (see pp. 8–10, 85–6). A connected theme, which is suggested by the materials but remains latent in Dr. White's text, concerns the extent to which international tribunals, faced with the task of resolving a complex of issues or producing a 'legislative' solution *ex aequo et bono*, may use experts in a manner which makes it more difficult to isolate the 'judicial' function (see pp. 126, 154–5, 172–3, 178–9). The 'legislative' function is prominent in boundary cases and the common distinction between judicial settlement of legal issues and settlement *ex aequo et bono* provides a somewhat false perspective. A viable frontier régime may not be obtainable by reference to 'legal' criteria, and yet the alternative is not necessarily a haphazard compromise: expert studies should be seen as a necessary complement to settlement according to law. The English lawyer would expect to find parallels *inter alia* in ministerial inquiries and the Restrictive Practices Court.

IAN BROWNLIE

The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience. By E. A. LANDY. London: Stevens & Sons; and New York: Oceana Publications, 1966. 268 pp. (including an Appendix of 55 pp.). £3. 17s. 6d.

The control procedure of the International Labour Organization is important for three reasons. First, it has subsequently been adopted by a number of the other specialized Agencies, including W.H.O. and U.N.E.S.C.O. Secondly, the procedure is substantially based on, and illustrates in a remarkable manner, the importance of the constitutional practice of an International Organization. Thirdly, it is a valuable depositary of experience of a widespread attempt at international supervision over thirty years.

Of the forty articles contained in the Constitution of the Organization more than one-quarter of them concern the establishment of machinery for the enforcement of Conventions and Recommendations. Articles 26–34 of the Convention contain the most elaborate and detailed provisions for the establishment of a commission of inquiry. However, this machinery has only been invoked on two occasions. Instead, a more flexible, informal, expeditious and continuous method of control has been devised by means of a vigorous interpretation of Articles 19 and 22 of the Constitution which oblige member States to make reports to the Organization.

These reports are then submitted to a quasi-judicial committee and a political committee. The former, called the Committee of Experts, was first set up in 1927 and its members are usually eminent jurists, nominated by the International Labour Office and chosen by the Governing Body. The experts make observations on the reports or requests for further information and embody their findings in a report to a committee of the General Conference of the Organization. This Committee, tripartite in composition, is chosen from the members attending the Conference and its function is to arraign the representatives of defaulting governments before it and require them to justify their conduct. The Committee then reports to the Conference itself and offending States are exposed to public pressure.

The above control and supervision machinery of the I.L.O. is admirably described and analysed by Mr. Landy (himself a member of the control division of the I.L.O.) in his book. The first chapter concerns the composition, powers and functions of the Committee of Experts and the Conference Committee. The second and third chapters deal with observations made by the two Committees concerning non-implementation of labour standards by member States and the effect of such observations. An analysis of 1,003 observations indicates that some action was taken by member States in 61 per cent. of the cases. Chapters four and five discuss the legal and practical impediments to the full implementation and observance of ratified Conventions. These chapters consider such problems as premature ratification, inflexible conventions, unforeseen difficulties, Federal States, collective agreements, incorporation in municipal law, economic, administrative and political difficulties. The last two chapters are concerned with the problems and prospects of I.L.O. supervision and its relevance to other fields of international supervision.

In the final analysis it may be submitted that the supervision machinery of the I.L.O. has proved efficient and effective. Of course there are a number of imperfections. Sometimes the questionnaire forms are not returned or the returns are incomplete or imprecise or do not give full details concerning practical application. However, in the majority of cases it has proved an acceptable, constructive and effective means of enforcing obligations assumed under international labour conventions. Mr. Landy's book is to be recommended as a valuable exposition of an important subject.

J. F. McMAHON

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